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A

SELECTION OF CASES

ON

THE LAW OF CARRIERS

OF GOODS AND OF PASSENGERS.

BY

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PREFACE.

ALTHOUGH this collection of cases as now published remains substantially the same as when the Cases on Carriers of Goods were published three years ago, and the Cases on Carriers of Passengers were added a year later, making the first complete edition, yet there have been such changes in plan as to make an entirely new preface proper; and the former one is omitted as not applicable to the book in its present form, although the general purpose and plan have not been materially changed.

Three principal considerations have been borne in mind in the selection of the cases to be included: First, to secure at least one case on each question involved in the law of carriers upon which the instructor would feel that he ought to give his class information, so that the collection will serve substantially the purpose of a text-book. Second, to select cases which present the principles of the subject by way of adjudication of actual controversies before a court, and not merely by way of dictum or argument in laying down the general propositions of law on the subject. These text-book cases are apparently satisfactory to the novice in the study of cases, because they seem to serve the purpose of a treatise, but they are not the cases which carry the greatest weight when cited, and therefore are not the cases which the student should master in determining what the law is. The writer of a treatise is in position to state more accurately and reliably the general propositions of law on a subject than is the judge who has before him for consideration only a particular question to be decided under one branch or rule of the subject, although he

may think it desirable to illustrate his reasoning by stating general propositions relating to other branches. Third, to choose cases which state what is believed to be the correct or preponderating rule as to any particular question, where there is a conflict; but where the conflict is marked and there are strong reasons or weighty authorities on each side, then it has been sought to present at least one case on each side for the purpose of indicating the conflict. If this has not been deemed expedient, then the fact of the existence of a difference of view is indicated by references *contra* in a note. But the harmonizing of apparent conflicts and the collection of authorities upholding opposing views has been left for the student's own efforts under the guidance of his instructor, the object of this collection being, not to render unnecessary or minimize the work of the teacher, but only to furnish suitable material to be placed in the hands of the student in connection with a course of instruction on the subject.

In order however to guide the student, as well as the teacher, in forming some connected plan of the whole subject which shall serve to indicate the relation of the cases to each other and form a basis for other reading, the cases have been arranged in accordance with an analysis which is presented at the beginning of the book and carried through it by means of headings and subheadings. There is no intention by means of this analysis to lessen the labors of either the teacher or the student by stating in condensed form what the law is, for it is believed that such condensed and analytical statements, useful as they may be as a summing up and conclusion of information already acquired, are entirely misleading when relied upon as sources of information on the law, and detrimental in that they induce many students to omit that careful and critical study which gives to a legal education its principal disciplinary value. With the same view, all headnotes or brief statements of points decided have been omitted.

In order to bring the collection within reasonable scope, portions of some of the opinions, which have no bearing on the point

which the case is intended to illustrate, are omitted, and in most cases also the arguments of counsel. While the retention of each case intact would have been in itself advantageous, yet the corresponding advantage of being able to present within the necessary limits of such a collection other more important matter has been thought to justify such slight omissions as have been made. But all omissions, except in case of names and arguments of counsel, have been in some form indicated. No effort has been made to edit the opinions or correct the references; but wherever a case has been found cited which is included in this collection, the fact is indicated by a reference in bold-faced type to the page where the case may be found.

EMLIN McCLAIN.

Iowa City, July, 1896.

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SELECT CASES

ON

THE LAW OF CARRIERS.

INTRODUCTION.

PUBLIC CALLINGS.

MUNN *v.* ILLINOIS.[1]

94 U. S. 113. 1876.

Chief Justice Waite: The question to be determined in this case is whether the general assembly of Illinois can, under the limitations upon the legislative power of the States imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the State having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

It is claimed that such a law is repugnant —

. . . . . .

To that part of Amendment 14 [to the Constitution of the United States] which ordains that no State shall "deprive any person of life, liberty, or property, without due procession of law, nor deny to any person within its jurisdiction the equal protection of the laws."

We will consider the last of these objections first.

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.

The Constitution contains no definition of the word "deprive," as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

[1] *Acc.:* Budd *v.* New York, 143 U. S. 517; Brass *v.* Stoeser, 153 U. S. 391.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in Magna Charta and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the States.

When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in expressed terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the government of the States possesses all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions.

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the Preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private, Thorpe v. R. & B. Railroad Co., 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 583, "are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulations become necessary

for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington "to regulate . . . the rates of wharfage at private wharves, . . . the sweeping of chimneys, and to fix the rates of fees therefor, . . . and the weight and quality of bread," 3 Stat. 587, sect. 7; and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers," 9 id. 224, sect. 2.

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply prevents the State from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise De Portibus Maris, 1 Harg. Law Tracts, 78, and has been accepted without an objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

Thus, as to ferries, Lord Hale says, in his treatise De Jure Maris, 1 Harg. Law Tracts, 6, the king has "a right of franchise or privilege, that no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the king.

He may make a ferry for his own use or the use of his family, but not for the common use of all the king's subjects passing that way; because it doth in consequence tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under a public regulation, viz., that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these he is finable." So if one owns the soil and landing-places on both banks of a stream, he cannot use them for the purposes of a public ferry, except upon such terms and conditions as the body politic may from time to time impose; and this because the common good requires that all public ways shall be under the control of the public authorities. This privilege or prerogative of the king, who in this connection only represents and gives another name to the body politic, is not primarily for his profit, but for the protection of the people and the promotion of the general welfare.

And, again, as to wharves and wharfingers, Lord Hale, in his treatise De Portibus Maris, already cited, says: —

"A man, for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own. . . . If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the queen, . . . or because there is no wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only, as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by a public interest."

This statement of the law by Lord Hale was cited with approbation and acted upon by Lord Kenyon at the beginning of the present century, in Bolt v. Stennett, 8 T. R. 606.

And the same has been held as to warehouses and warehousemen. In Allnutt v. Inglis, 12 East, 527, decided in 1810, it appeared that the London Dock Company had built warehouses in which wines were taken in store at such rates of charge as the company and the owners might agree upon. Afterwards the company obtained authority, under the general warehousing act, to receive wines from imports before the duties upon the importation were paid; and the question was, whether they could charge arbitrary rates for such storage or must be content with a reasonable compensation. Upon this point Lord Ellenborough said (p. 537): —

"There is no doubt that the general principle is favored, both in law and justice, that every man may fix whatever price he pleases upon his own property, or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms. The question then is, whether, circumstanced as this company is, by the combination of the warehousing act with the act by which they were originally constituted, and with the actually existing state of things in the port of London, whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord Hale, obliged to limit themselves to a reasonable compensation for such warehousing. And, according to him, whenever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port, and where he is the owner of the only wharf authorized to receive goods which happens to be built in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf."

And further on (p. 539): —

"It is enough that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches, as laid down by Lord Hale in the passage referred to (that from De Portibus Maris already quoted), which includes the good sense as well as the law of the subject."

And in the same case Le Blanc, J., said (p. 541): —

"Then, admitting these warehouses to be private property, and that the company might discontinue this application of them, or that they might have made what terms they pleased in the first instance, yet having, as they now have, this monopoly, the question is, whether the warehouses be not private property clothed with a public right, and, if so, the principle of law attaches upon them. The privilege, then, of bonding these wines being at present conferred by the Act of Parliament to the company's warehouses, is it not the privilege of the public, and shall not that which is for the good of the public attach on the monopoly, that they shall not be bound to pay an arbitrary but a reasonable rent? But upon this record the company resist having their demand for warehouse rent confined within any limit; and, though it does not follow that the rent, in fact, fixed by them is unreasonable, they do not choose to insist on its being reasonable for the purpose of raising the question. For this purpose, therefore, the question may be taken to be whether they may claim an unreasonable rent. But though this be private property, yet the principle laid down by Lord Hale attaches upon it, that when private property is affected with a public interest it ceases to be *juris privati* only; and, in case of its dedication to such a purpose

as this, the owners cannot take arbitrary and excessive duties, but the duties must be reasonable."

We have quoted, thus largely, the words of these eminent expounders of the common law, because, as we think, we find in them the principle which supports the legislation we are now examining. Of Lord Hale it was once said by a learned American judge: —

"In England, even on the rights of prerogative, they scan his words with as much care as if they had been found in Magna Charta; and, the meaning once ascertained, they do not trouble themselves to search any further." 6 Cow. (N. Y.) 536, note.

In later times, the same principle came under consideration in the Supreme Court of Alabama. The Court was called upon, in 1841, to decide whether the power granted to the city of Mobile to regulate the weight and price of bread was unconstitutional, and it was contended that "it would interfere with the right of the citizen to pursue his lawful trade or calling in the mode his judgment might dictate;" but the court said, "there is no motive . . . for this interference on the part of the legislature with the lawful actions of individuals, or the mode in which private property shall be enjoyed, unless such calling affects the public interest, or private property is employed in a manner which directly affects the body of the people. Upon this principle, in this State, tavern-keepers are licensed; . . . and the County Court is required, at least once a year, to settle the rates of innkeepers. Upon the same principle is founded the control which the legislature has always exercised in the establishment and regulation of mills, ferries, bridges, turnpike roads, and other kindred subjects." Mobile *v.* Yuille, 3 Ala. N. S. 140.

From the same source comes the power to regulate the charges of common carriers, which was done in England as long ago as the third year of the reign of William and Mary, and continued until within a comparatively recent period. And in the first statute we find the following suggestive preamble, to wit: —

"And whereas divers wagoners, and other carriers, by combination amongst themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of the trade: Be it, therefore, enacted," etc. 3 W. & M. c. 12, sect. 24; 3 Stat. at Large (Great Britain), 481.

Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. New Jersey Nav. Co. *v.* Merchants' Bank, 6 How. 382. Their business is, therefore, "affected with a public interest," within the meaning of the doctrine which Lord Hale has so forcibly stated.

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the body politic to require them to conform to such regulation as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted.

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Justice Field (dissenting).[1] . . . . . .

The power of the State over the property of the citizen under the constitutional guaranty is well defined. The State may take his property for public uses, upon just compensation being made therefor. It may take a portion of his property by way of taxation for the support of the government. It may control the use and possession of his property, so far as may be necessary for the protection of the rights of others, and to secure to them the equal use and enjoyment of their property. The doctrine that each one must so use his own as not to injure his neighbor, — *sic utere tuo ut alienum non lædas*, — is the rule by which every member of society must possess and enjoy his property; and all legislation essential to secure this common and equal enjoyment is a legitimate exercise of State authority. Except in cases where property may be destroyed to arrest a conflagration or the ravages of pestilence, or be taken under the pressure of an immediate and overwhelming necessity to prevent a public calamity, the power of the State over the property of the citizen does not extend beyond such limits.

It is true that the legislation which secures to all protection in their rights, and the equal use and enjoyment of their property, embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals, and health of the community, comes within its scope; and every one must use and enjoy his property subject to the restrictions which such legislation imposes. What is termed the police power of the State, which, from the language often used respecting it, one would suppose to be an undefined and irresponsible element in government, can only interfere with the conduct of individuals in their intercourse with each other, and in the use of their property, so far as may be required to secure these objects. The compensation which the owners of property, not having any special rights or privileges from the government in connec-

[1] Justice Strong concurred in the dissent.

tion with it, may demand for its use, or for their own services in union with it, forms no element of consideration in prescribing regulations for that purpose. If one construct a building in a city, the State, or the municipality exercising a delegated power from the State, may require its walls to be of sufficient thickness for the uses intended; it may forbid the employment of inflammable materials in its construction, so as not to endanger the safety of his neighbors; if designed as a theatre, church, or public hall, it may prescribe ample means of egress, so as to afford facility for escape in case of accident; it may forbid the storage in it of powder, nitro-glycerine, or other explosive material; it may require its occupants to remove daily decayed vegetable and animal matter, which would otherwise accumulate and engender disease; it may exclude from it all occupations and business calculated to disturb the neighborhood or infect the air. Indeed, there is no end of regulations with respect to the use of property which may not be legitimately prescribed, having for their object the peace, good order, safety, and health of the community, thus securing to all the equal enjoyment of their property; but in establishing these regulations it is evident that compensation to the owner for the use of his property, or for his services in union with it, is not a matter of any importance; whether it be one sum or another does not affect the regulation, either in respect to its utility or mode of enforcement. One may go, in like manner, through the whole round of regulations authorized by legislation, State or municipal, under what is termed the police power, and in no instance will he find that the compensation of the owner for the use of his property has any influence in establishing them. It is only where some right or privilege is conferred by the government or municipality upon the owner, which he can use in connection with his property, or by means of which the use of his property is rendered more valuable to him, or he thereby enjoys an advantage over others, that the compensation to be received by him becomes a legitimate matter of regulation. Submission to the regulation of compensation in such cases is an implied condition of the grant, and the State, in exercising its power of prescribing compensation, only determines the conditions upon which its concessions shall be enjoyed. When the privilege ends, the power of regulation ceases.

Jurists and writers on public law find authority for the exercise of this police power of the State and the numerous regulations which it prescribes in the doctrine already stated, that every one must use and enjoy his property consistently with the rights of others, and the equal use and enjoyment by them of their property. "The police power of the State," says the Supreme Court of Vermont, "extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property in the State. According to the maxim, *sic utere tuo ut alienum non laedas*, which being of universal application, it must, of course, be within the range

of legislative action *to define the mode and manner in which every one may so use his own as not to injure others.*" Thorpe *v.* Rutland & Burlington Railroad Co., 27 Vt. 149. "We think it a settled principle growing out of the nature of well-ordered civilized society," says the Supreme Court of Massachusetts, "that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it *shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property nor injurious to the rights of the community.*" Commonwealth *v.* Alger, 7 Cush. 84. In his Commentaries, after speaking of the protection afforded by the Constitution to private property, Chancellor Kent says: "But though property be thus protected, it is still to be understood that the law-giver has the right to prescribe the mode and manner of using it, *so far as may be necessary to prevent the abuse of the right, to the injury or annoyance of others, or of the public.* The government may, by general regulations, interdict such uses of property as would create nuisances and become dangerous to the lives, or health, or peace, or comfort of the citizens. Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam-power to propel cars, the building with combustible materials, and the burial of the dead may all be interdicted by law, in the midst of dense masses of population, *on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community.*" 2 Kent, 340.

The Italics in these citations are mine. The citations show what I have already stated to be the case, that the regulations which the State, in the exercise of its police power, authorizes with respect to the use of property are entirely independent of any question of compensation for such use, or for the services of the owner in connection with it.

There is nothing in the character of the business of the defendants as warehousemen which called for the interference complained of in this case. Their buildings are not nuisances; their occupation of receiving and restoring grain infringes upon no rights of others, disturbs no neighborhood, infects not the air, and in no respect prevents others from using and enjoying their property as to them may seem best. The legislation in question is nothing less than a bold assertion of absolute power by the State to control at its discretion the property and business of the citizen, and fix the compensation he shall receive. The will of the legislature is made the condition upon which the owner shall receive the fruits of his property and the just reward of his labor, industry, and enterprise. "That government," said Story, "can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of the legislative body without any restraint. The fundamental maxims of

a free government seem to require that the rights of personal liberty and private property should be held sacred." Wilkeson *v.* Leland, 2 Pet. 657. The decision of the Court in this case gives unrestrained license to legislative will.

The several instances mentioned by counsel in the argument, and by the Court in its opinion, in which legislation has fixed the compensation which parties may receive for the use of their property and services, do not militate against the views I have expressed of the power of the State over the property of the citizen. They were mostly cases of public ferries, bridges, and turnpikes, of wharfingers, hackmen, and draymen, and of interest on money. In all these cases, except that of interest on money, which I shall presently notice, there was some special privilege granted by the State or municipality; and no one, I suppose, has ever contended that the State has not a right to prescribe the conditions upon which such privileges should be enjoyed. The State in such cases exercises no greater right than an individual may exercise over the use of his own property when leased or loaned to others. The conditions upon which the privilege shall be enjoyed being stated or implied in the legislation authorizing its grant, no right is, of course, impaired by their enforcement. The recipient of the privilege, in effect, stipulates to comply with the conditions. It matters not how limited the privilege conferred, its acceptance implies an assent to the regulation of its use and the compensation for it. The privilege which the hackman and drayman have to the use of stands on the public streets, not allowed to the ordinary coachman or laborer with teams, constitutes a sufficient warrant for the regulation of their fares. In the case of the warehousemen of Chicago, no right or privilege is conferred by the government upon them; and hence no assent of theirs can be alleged to justify any interference with their charges for the use of the property.

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I. CARRIERS OF GOODS.

1. WHO ARE COMMON CARRIERS.

a. *Public Calling; Compensation.*

ALLEN *et al.*, Appellants, *v.* SACKRIDER *et al.*

37 N. Y. 341. 1867.

Parker, J. The action was brought against the defendants to charge them, as common carriers, with damage to a quantity of grain shipped by the plaintiffs in the sloop of the defendants, to be transported from Trenton, in the province of Canada, to Ogdensburgh, in this State, which accrued from the wetting of the grain in a storm.

The case was referred to a referee, who found as follows: —

"The plaintiffs, in the fall of 1859, were partners, doing business at Ogdensburgh. The defendants were the owners of the sloop 'Creole,' of which Farnham was master. In the fall of 1859 the plaintiffs applied to the defendants to bring a load of grain from the bay of Quinte to Ogdensburgh. The master stated that he was a stranger to the bay, and did not know whether his sloop had capacity to go there. Being assured by the plaintiff that she had, he engaged for the trip at three cents per bushel, and performed it with safety. In November, 1859, plaintiffs again applied to defendants to make another similar trip for grain, and it was agreed at one hundred dollars for the trip. The vessel proceeded to the bay, took in a load of grain, and on her return was driven on shore, and the cargo injured to the amount of $1346.34; that the injury did not result from the want of ordinary care, skill, or foresight, nor was it the result of inevitable accident, or what, in law, is termed the act of God. From these facts, my conclusions of law are, that the defendants were special carriers, and only liable as such, and not as common carriers; and that the proof does not establish such facts as would make the defendants liable as special carriers; and, therefore, the plaintiffs have no cause of action against them."

The only question in the case is, were the defendants common carriers? The facts found by the referee do not, I think, make the defendants common carriers. They owned a sloop; but it does not appear that it was ever offered to the public or to individuals for use, or ever put to any use, except in the two trips which it made for the plaintiffs, at their special request. Nor does it appear that the defendants were engaged in the business of carrying goods, or that they held themselves out to the world as carriers, or had ever

offered their services as such. This casual use of their sloop in transporting plaintiffs' property falls short of proof sufficient to show them common carriers.

A common carrier was defined, in Gisbourn *v.* Hurst, 1 Salk. 249,[1] to be, any man undertaking, for hire, to carry the goods *of all persons indifferently;*" and in Dwight *v.* Brewster, 1 Pick. 50 [16], to be one who undertakes, for hire, to transport the goods of *such as choose to employ him*, from place to place." In Orange Bank *v.* Brown, 3 Wend. 161, Chief Justice Savage said: "Every person who undertakes to carry, for a compensation, the *goods of all persons indifferently*, is, as to the liability imposed, to be considered a common carrier. The distinction between a common carrier and a private or special carrier is, that the former holds himself out *in common*, that is, to all persons who choose to employ him, as ready to carry for hire; while the latter agrees, in some special case, with some private individual, to carry for hire." Story on Contracts, § 732 *a*. The employment of a common carrier is a public one, and he assumes a public duty, and is bound to receive and carry the goods of any one who offers. "On the whole," says Professor Parsons, "it seems to be clear that no one can be considered as a common carrier unless he has, in some way, held himself out to the public as a carrier, in such manner as to render him liable to an action if he should refuse to carry for any one who wished to employ him." 2 Pars. on Cont. [5th ed.] 166, note.

The learned counsel for the appellant in effect recognizes the necessity of the carrier holding himself out to the world as such, in order to invest him with the character and responsibilities of a common carrier; and, to meet that necessity, says: "The 'Creole' was a freight vessel, rigged and manned suitably for carrying freight

[1] GISBOURN *v.* HURST.

COMMON BENCH, 1 Salk. 249. 1710.

In error upon a special verdict the case was, The goods in the declaration were the plaintiff's, and by him delivered in London to one Richardson, to carry down to Birmingham. This Richardson was not a common carrier, but for some small time last past brought cheese to London, and in his return took such goods as he could get to carry back to his own home into the country for a reasonable price. When he returned home, he put his wagon with the cheese into the barn, where it continued two nights and a day, and then the landlord came and distrained the cheese for rent due for the house, which was not an inn, but a private house; and it was agreed *per cur.* That goods delivered to any person exercising a public trade or employment to be carried, wrought, or managed in the way of his trade or employ, are for that time under a legal protection, and privileged from distress for rent; but this being a private undertaking required a further consideration; and it was resolved, That any man undertaking for hire to carry the goods of all persons indifferently, as in this case, is, as to this privilege, a common carrier; for the law has given the privilege in respect of the trade, and not in respect of the carrier; and the case in Cro. El. 590, is stronger. Two tradesmen brought their wool to a neighbor's barn, which he kept for his private use, and it was held that it could not be distrained.

from port to port; her appearance in the harbor of Ogdensburgh, waiting for business, was an emphatic advertisement that she sought employment." These facts do not appear in the findings of the referee, and, therefore, cannot, if they existed, help the appellants upon this appeal.

It is not claimed that the defendants are liable, unless as common carriers. Very clearly they were not common carriers; and the judgment should, therefore, be affirmed.

GORDON *v.* HUTCHINSON.

1 W. & S. (Pa.) 285. 1841.

THIS was an action on the case by James B. Hutchinson against James Gordon. The defendant pleaded *non assumpsit.*

The facts were that the defendant, being a farmer, applied at the store of the plaintiff for the hauling of goods from Lewistown to Bellefonte, upon his return from the former place, where he was going with a load of iron. He received an order and loaded the goods. On the way the head came out of a hogshead of molasses, and it was wholly lost. In this action the plaintiff claimed to recover the price of it. There was much proof on the subject of the occasion of the loss: whether it was in consequence of expansion of the molasses from heat, or of negligence on the part of the wagoner, of which there was strong evidence.

The defendant took the ground that he was not subject to the responsibilities of a common carrier, but only answerable for negligence, inasmuch as he was only employed occasionally to carry for hire. But the Court below (WOODWARD, President) instructed the jury that the defendant was answerable upon the principles which govern the liabilities of a common carrier.

GIBSON, C. J. The best definition of a common carrier in its application to the business of this country is that which Mr. Jeremy (Law of Carriers, 4) has taken from Gisbourn *v.* Hurst, 1 Salk. 249 [**12**], which was the case of one who was at first not thought to be a common carrier only because he had, *for some small time before,* brought cheese to London, and taken such goods as he could get to carry back into the country at a reasonable price; but the goods having been distrained for the rent of a barn into which he had put his wagon for safe keeping, it was finally resolved that any man undertaking to carry the goods of *all persons indifferently,* is, as to exemption from distress, a common carrier. Mr. Justice Story has cited this case (Commentaries on Bail. 322) to prove that a common carrier is one who holds himself out as ready to engage in the transportation of goods for hire *as a business,* and not as a casual occu-

patum *pro hac vice*. My conclusion from it is different. I take it a wagoner who carries goods for hire is a common carrier, whether transportation be his principal and direct business, or an occasional and incidental employment. It is true the Court went no further than to say the wagoner was a common carrier as to the privilege of exemption from distress; but his contract was held not to be a private undertaking as the Court was at first inclined to consider it, but a public engagement, by reason of his readiness to carry for any one who would employ him, without regard to his other avocations, and he would consequently not only be entitled to the privileges, but be subject to the responsibilities of a common carrier; indeed, they are correlative, and there is no reason why he should enjoy the one without being burdened with the other. Chancellor Kent (2 Commentaries, 597) states the law on the authority of Robinson *v.* Dunmore, 2 Bos. & Pul. 416, to be that a carrier for hire *in a particular case*, not exercising the business of a *common* carrier, is answerable only for ordinary neglect, unless he assume the risk of a common carrier by express contract; and Mr. Justice Story (Com. on Bail. 298) as well as the learned annotator on Sir William Jones's Essay (Law of Bail. 103 d. note 3) does the same on the authority of the same case. There, however, the defendant was held liable on a special contract of warranty, that the goods should go safe; and it was therefore not material whether he was a general carrier or not. The judges, indeed, said that he was not a common carrier, but one who had put himself in the case of a common carrier by his agreement, yet even a common carrier may restrict his responsibility by a special acceptance of the goods, and may also make himself answerable by a special agreement as well as on the custom. The question of carrier or not, therefore, did not necessarily enter into the inquiry, and we cannot suppose the judges gave it their principal attention.

But rules which have received their form from the business of a people whose occupations are definite, regular, and fixed must be applied with much caution and no little qualification to the business of a people whose occupations are vague, desultory, and irregular. In England, one who holds himself out as a general carrier is bound to take employment at the current price; but it will not be thought that he is bound to do so here. Nothing was more common formerly than for the wagoners to lie by in Philadelphia for a rise of wages. In England the obligation to carry at request upon the carrier's particular route is the criterion of the profession, but it is certainly not so with us. In Pennsylvania, we had no carriers exclusively between particular places, before the establishment of our public lines of transportation; and according to the English principle we could have had no common carriers, for it was not pretended that a wagoner could be compelled to load for any part of the Continent. But the policy of holding him answerable as an insurer was more obviously

dictated by the solitary and mountainous regions through which his course for the most part lay, than it is by the frequented thoroughfares of England. But the Pennsylvania wagoner was not always such even by profession. No inconsiderable part of the transportation was done by the farmers of the interior, who took their produce to Philadelphia, and procured return loads for the retail merchants of the neighboring towns; and many of them passed by their homes with loads to Pittsburg or Wheeling, the principal points of embarkation on the Ohio. But no one supposed they were not responsible as common carriers; and they always compensated losses as such. They presented themselves as applicants for employment to those who could give it; and were not distinguishable in their appearance, or in their equipment of their teams, from carriers by profession. I can readily understand why a carpenter, encouraged by an employer to undertake the job of a cabinet-maker, shall not be bound to bring the skill of a workman to the execution of it; or why a farmer, taking his horses from the plough to turn teamster at the solicitation of his neighbor, shall be answerable for nothing less than good faith; but I am unable to understand why a wagoner soliciting the employment of a common carrier, shall be prevented, by the nature of any other employment he may sometimes follow, from contracting the responsibility of one. What has a merchant to do with the private business of those who publicly solicit employment from him? They offer themselves to him as competent to perform the service required, and, in the absence of express reservation, they contract to perform it on the usual terms, and under the usual responsibility. Now, what is the case here? The defendant is a farmer, but has occasionally done jobs as a carrier. That, however, is immaterial. He applied for the transportation of these goods as a matter of business, and consequently on the usual conditions. His agency was not sought in consequence of a special confidence reposed in him — there was nothing special in the case — on the contrary, the employment was sought by himself, and there is nothing to show that it was given on terms of diminished responsibility. There was evidence of negligence before the jury; but, independent of that, we are of opinion that he is liable as an insurer.

Judgment affirmed.[1]

CITIZENS' BANK *v.* NANTUCKET STEAMBOAT CO.

2 Story (U. S. C. C.), 16. 1811.

Story, Circuit Justice. . . . The suit is in substance brought to recover from the steamboat company a sum of money, in bank bills and accounts, belonging to the Citizens' Bank, which was intrusted

[1] *Acc.:* Moss *v.* Bettis, 4 Heisk. 661. *Contra:* Fish *v.* Chapman, 2 Ga. 349.

by the cashier of the bank to the master of the steamboat, to be carried in the steamboat from the island of Nantucket to the port of New Bedford, across the intermediate sea, which money has been lost, and never duly delivered by the master. . . .

Having stated these preliminary doctrines, which seem necessary to a just understanding of the case, we may now proceed to a direct consideration of the merits of the present controversy. And in my judgment, although there are several principles of law involved in it, yet it mainly turns upon a matter of fact; namely, whether the steamboat company were, or held themselves out to the public to be, common carriers of money and bank bills, as well as of passengers and goods and merchandise, in the strict sense of the latter terms; or the employment of the steamboat was, so far as the company are concerned, limited to the mere transportation of passengers and goods and merchandise on freight or for hire; and money and bank bills, although known to the company to be carried by the master, were treated by them as a mere personal trust in the master by the owners of the money and bank bills, as their private agents, and for which the company never held themselves out to the public as responsible, or as being within the scope of their employment and business as carriers.

The ground of the defence of the company is, that, in point of fact, although the transportation of money and bank bills by the master was well known to them, yet it constituted no part of their own business or employment; that they never were, in fact, common carriers of money or bank bills; that they never held themselves out to the public as such, and never received any compensation therefor; that the master, in receiving and transporting money and bank bills, acted as the mere private agent of the particular parties, who intrusted the same to him, and not as the agent of the company or by their authority; that, in truth, he acted as a mere gratuitous bailee or mandatary on all such occasions; and even if he stipulated for, or received, any hire or compensation for such services, he did so, not as the agent of or on account of the company, but on his own private account, as a matter of agency for the particular bailors or mandators. Now, certainly, if these matters are substantially made out by the evidence, they constitute a complete defence against the present suit.

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DWIGHT *v.* BREWSTER.

1 Pick. (Mass.) 50. 1822.

The defendants contended that they were not liable as common carriers, their business being the conveyance of passengers and their luggage; that the taking small packages was an affair of the drivers,

who received the compensation, and who were answerable for negligence only, and that the proprietors were not responsible, though it appeared that less wages were paid to the drivers, in consequence of the opportunity they had of earning small sums of money in this way; whereas large packages were usually entered on the way-bill, and the proprietors received the compensation for the transportation.

Parker, C. J. . . . On the second count, which charges the defendants as common carriers, we think the facts proved are sufficient to constitute them such. Packages were usually taken in the stage-coach for transportation; large packages were entered in the book kept for the proprietors, and compensation taken for their use. That the principal business was to carry the mail and passengers is no reason why the proprietors should not be common carriers of merchandise, etc. A common carrier is one who undertakes, for hire or reward, to transport the goods of such as choose to employ him from place to place. This may be carried on at the same time with other business. The instruction of the judge in this particular, that the practice of taking parcels for hire, to be conveyed in the stagecoach, constituted the defendants common carriers, we think was right.

FLINT, etc. R. CO. *v.* WEIR.

37 Mich. 111. 1876.

Cooley, C. J. . . . The evidence was put into the case by stipulation, and in the main the facts are undisputed. It appears that the plaintiff took passage upon the cars of the defendant from Detroit to Saginaw, and that he had with him a trunk, which he avers contained the articles of personal property described in the declaration. This trunk has been lost, but whether through any fault of the railway company is in dispute. It is, however, shown by the plaintiff himself that both he and his trunk were being carried, not for hire and reward, but gratuitously. There was consequently no contract for carriage by the railway company, and this action, which is in assumpsit, cannot be maintained. Nolton *v.* Western R. Corp., 15 N. Y. 444, 446.

There can be no question that a railway company which receives property for gratuitous carriage assumes, like any other gratuitous bailee, certain duties in respect to it, and that a suit will lie for a failure to perform these duties. But the obligation in such case is quite different from the obligation of a bailee who, for a consideration received or promised, undertakes to carry or to perform any other service with respect to the subject of the bailment. In the

latter case the terms of the contract, if an express contract was made, will be the measure of the duties to be performed; and in the absence of any express contract the law itself will impose upon the bailee a higher degree of care and watchfulness than it demands of him who, for the mere accommodation of the bailor, undertakes the charge of his goods. The gratuitous bailee must not be reckless; he must observe such care as may reasonably be required of him under the circumstances; but it is not the same care which is required of the bailee who, for his own profit, assumes the duty. This is elementary, and is so reasonable that it requires no discussion. When care is bargained for and compensated, something is expected and is demandable beyond what can be required of him who undertakes a merely gratuitous favor.

Reliance is placed by the plaintiff upon certain cases which are supposed to have decided that the obligation of a railway company to carry safely is unaffected by the fact that no fare was paid. None of them so decides. . . .

But we do not care to comment upon these cases, or to say more of them than this: that the right of recovery in each of them where the carriage was gratuitous was based upon the duty of one who undertakes to carry persons, to carry them safely, — a duty independent of any contract, and which the carrier owes, not exclusively to the person being carried, but also to the State itself. In such a case, especially if the mode of carriage is peculiarly subject to dangerous and destructive accidents, the carrier may well be required to observe a high degree of care and diligence. But where only property is in question, there is no reason why any different rule should be applied to a railroad company taking charge of property gratuitously, to that which governs the relation in the case in any other gratuitous bailment. Nor is it material that the gratuitous carriage of a trunk was accompanied by the gratuitous carriage of a person; the duty to carry the trunk safely was only the same that the law would have imposed had the trunk been taken upon a freight train gratuitously; and no greater degree of care could be demanded in one case than in the other. It may therefore be conceded that the same extreme care is demandable of carriers of persons in all cases where injuries to persons are in question, and the concession will not in any manner affect the present suit.

But as the plaintiff has brought his action, not in tort, but upon contract, there can be no recovery under his declaration, and the extent of the duty which, under the circumstances, was imposed upon the railway company becomes immaterial. The judgment must be reversed, with costs, but as the facts are not embodied in a finding by the circuit judge, so as to permit of our entering final judgment in this court, a new trial must be ordered.

PIERCE *v.* MILWAUKEE, ETC. R. CO.

23 Wis. 387. 1868.

ACTION to recover the value of eight bundles of bags, which had been in use for two seasons in transporting grain from Lake City, Minnesota, to Genoa, Wisconsin, by way of the river and the defendant's railway. The complaint alleged that the bags were delivered by the packet company doing business on the river, to the defendant at La Crosse; and that defendant, as a common carrier, received said bags to be safely carried by it over its railway, and delivered at Milwaukee to the plaintiff, "for a reasonable compensation to be paid by the plaintiff therefor." Answer, a general denial. At the trial defendant sought to avoid liability, as a common carrier, for the loss of the bags, by showing a uniform and long-established custom of the river and railway, that all bags used in the transportation of grain on said river or railway were carried free of charge, when empty, claiming that for bags so carried it could be held responsible only in case of gross negligence.

PAINE, J. After carefully considering the original briefs of counsel and the arguments upon the rehearing, I have come to the conclusion that the carrying of the bags of the plaintiff by the company cannot be considered as gratuitous, whether the custom was only to return bags free that had gone over the road filled, or whether it was a general custom to carry the bags of customers free both ways, without regard to the question whether, at any particular time, they were returning from a trip on which they had passed over the road, filled or not. If such a relation were created by an express contract, instead of being based upon a custom, it would seem clear that there would be a sufficient consideration for the agreement to carry the bags. If a written contract should be signed by the parties, in which the one should agree to give the company the transportation of his grain at its usual rates, and the company should agree in consideration thereof to carry the grain at those rates, and also to carry the bags both ways whenever the customer might desire it, without any further charge, there can be no doubt that the giving to the company his business, and the payment of the regular freight, would be held to constitute the consideration for this part of the agreement on the part of the company. But if it would be so in such a case, it is equally so when the same understanding is arrived at through the means of a custom. The company, by establishing such a custom, makes the proposition to all persons, that if they will become its customers, it will carry their bags both ways without any other compensation than the freight upon the grain. Persons who become its customers in view of such

a custom do so with that understanding. And the patronage and the freights paid are the consideration for carrying the bags. The company, in making such a proposition, must consider that this additional privilege constitutes an inducement to shippers to give it their freight. And it must expect to derive a sufficient advantage from an increase of business occasioned by such inducement, to compensate it for such transportation of the bags. And it ought not to be allowed, when parties have become its customers with such an understanding, after losing their bags, to shelter itself under the pretext that the carrying of the bags was a mere gratuity, and it is therefore liable only for gross negligence.

It makes no difference that the custom is described as being to carry the bags *free*. In determining whether they are really carried "free" or not, the whole transaction between the parties must be considered. And when this is done, it is found that all that is meant by saying that the empty bags are carried free, is, that the customers pay no other consideration for it than the freight derived from the business they give the company. But this, as already seen, is sufficient to prevent the transportation of the bags from being gratuitous. Smith *v.* R. R. Co., 24 N. Y. 222; see also Bissel *v.* Railroad Co., 25 id. 442. . . .

I can see no ground for any such difficulty as that suggested by the appellant's counsel on the re-argument. He said, if this undertaking to return bags free was to be considered a matter of contract on the part of the company, it would be unable to collect its freight on delivering grain upon the ground that its contract was not then completed. But this could not be so. The company, on delivering the grain, parts with the possession of the property to the shipper or his consignee. And on doing that, it is of course entitled to its freight. And its agreement to return the bags without further charge, or to carry them free both ways whenever its customer should deliver them empty for that purpose, could not have the effect of destroying this right. The contract would be construed according to the intention of the parties. See Angell on Carriers, § 309, note 3, and cases cited. And here it would be very obvious that neither of the parties contemplated any relinquishment by the company of its right to freight on delivering the grain. The transaction for that purpose would be distinct. Here the defendant's evidence showed that the plaintiff was a "customer." The company claims that he had complied with the custom on his part, so as to make it applicable to him. But if he had done so, as that constitutes a sufficient consideration to prevent the carrying of his bags from being gratuitous, the company is liable.

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By THE COURT. The judgment is affirmed, with costs.

GRAY *v.* MISSOURI RIVER PACKET CO., Appellant.

64 Mo. 47. 1876.

Norton, Judge. This was an action in which defendant is sought to be charged as a common carrier for transporting a jack, the property of plaintiff, in so careless a manner as to occasion his death. The defendant by way of defence denied negligence as charged, and set up in his answer as a further defence that the shipment of the jack was to be made gratuitously and without compensation, and not for hire. . . . .

The following instruction asked by defendant was refused by the Court: "If the jury believe from the evidence that the jack in controversy was to be transported from Berlin on the south side of the Missouri River to Grider's landing on the north side of said river by said defendants, without hire or reward from plaintiff and solely and gratuitously to accommodate plaintiff, then the defendant is not liable in this action unless the jury should further find that the defendant was guilty of gross negligence, which the Court defines to be that omission of care which even the most inattentive and thoughtless never fail to take of their own concerns." The instruction asserted a correct principle of law as applicable to mere mandataries. It was nevertheless rightfully refused by the Court, because under the view we take of the case, as disclosed in the record, there was no evidence on which to base it. It appears from the evidence that plaintiff applied to one Rider, captain of the Steamboat "Alice," which was being used by defendants in their business as carriers, to ship his horse and jack, and that he agreed to transport them for him. He asked Rider what would be the charge, who said in reply that he never took anything for less than a dollar, and directed plaintiff to bring on his stock. Rider testifies as follows: "I promised Gray to take his stock; he came and asked me what I would charge. I said 'not much, if anything.' I did not intend to charge him anything. I took him over purely to accommodate Gray."

The secret intention of Rider, unexpressed and locked up in his breast, not to charge Gray anything for the transportation of his stock, does not tend to establish an agreement for its gratuitous transportation, especially when connected with what he did express, that he would "charge him not much, if anything." We apprehend that if Gray had been sued for the transportation of his stock, it would have been no reply to the action for him to have set up as a defence that Rider said when he was applied to for the price that he would not charge him much, if anything.

After an injury results to property intrusted to a common carrier

for transportation, who upon receiving it for that purpose declined to fix the price or charge for the transportation, he cannot be allowed to come in and defeat a recovery by saying that at the time of its reception he had a secret intention, unexpressed to the shipper or consignor, and not agreed to by him, not to charge anything, and that the transportation was gratuitous and not for hire. The instruction copied as well as the first instruction asked by defendant upon a kindred subject were therefore properly refused. The seventh instruction given on behalf of plaintiff in so far as it contained the word "gratuitously" was erroneous, but as under the views above expressed no injury could result therefrom to defendant it is no cause for disturbing the judgment.

It is also objected that the court misdirected the jury by its third instruction, in which they were told that if they found for plaintiff they would assess his damages at the actual value of the jack at the time he was shipped with the six per cent interest from that time. It is a general rule that when goods are delivered by a common carrier according to contract, the measure of damages is the value of the goods with interest from the day they should have been delivered, less the freight if unpaid. Sedg. on Dam. 424; King *v.* Shepherd, 3 Sto. 349; Cushing *v.* Wells, Fargo & Co., 98 Mass. 550; Woodward *v.* Illinois Central R. R. Co., 1 Bissel, 503; Corby *v.* Davidson, 13 Minn. 92; Mote *v.* Chicago & N. W. R. R. Co., 27 Iowa, 22.

In the case of Atkinson *v.* Steamboat Castle Garden, 28 Mo. 124, Judge Scott remarks "that the allowance of interest in these cases depends on circumstances, and will be given or withheld in all other cases of unliquidated damages." When a loss occurs without negligence in cases of this class, interest might be withheld. In the case at bar the negligence as shown by the proof was of the grossest character, and the manner in which the jack was thrown down and dragged on to the boat might well have subjected the parties engaged in it to a prosecution under the statute for cruelty to animals. In consequence of it plaintiff had an animal with broken limbs thrown on his hands to be cared for, till he died from the injuries, one week after they were inflicted. We think the circumstances justified the allowance of interest.

While the instruction as to the measure of damages is silent in regard to the duty of the jury to deduct from the value of the animals and interest the freight, the silence of the court may be justified by the silence of the witnesses in regard to what it was worth.

The defendant agreed to ship the stock without the price being fixed or agreed upon, and the promise to pay what was reasonably worth arose by implication of law, and in the absence of proof, showing what it was worth, the court committed no error in not alluding to it.

Judgment affirmed.

b. *Various Classes of Business.*

HALE *v.* THE NEW JERSEY STEAM NAVIGATION CO.

15 Conn. 539. 1843.

Williams, Ch. J. The suit was brought for two carriages shipped on board the "Lexington," against the defendants, as common carriers, to be transported in said boat, for hire, from New York to Boston or Providence. The boat and goods were destroyed by fire, in the Sound; and a verdict being given for the plaintiff, the defendants excepted to the charge, and claimed: —

1. That they were not common carriers or subject to the rules that govern common carriers. It was long since settled, that any man, undertaking for hire to carry the goods of all persons indifferently, from place to place, is a common carrier. Gisbourn *v.* Hurst, 1 Salk. 249. Common carriers, says Judge Kent, consist of two distinct classes of men, viz., inland carriers by land or water, and carriers by sea; and in the aggregate body are included the owners of stage-coaches, who carry goods, as well as passengers for hire, — wagoners, teamsters, cartmen, the masters and owners of ships, vessels and all water-craft, including steam vessels and steam towboats belonging to internal as well as coasting and foreign navigation, lightermen and ferrymen. 2 Kent's Com. 598 (2nd ed.). And there is no difference between a land and a water carrier, 3 Esp. Ca. 127; 10 Johns. R. 7; Story on Bailments, 319, 323.

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LIVERPOOL STEAM CO. *v.* PHŒNIX INS. CO.[1]

129 U. S. 397. 1889.

Gray, J. (at page 437). . . . The contention that the appellant is not a common carrier may also be shortly disposed of.

By the settled law, in the absence of some valid agreement to the contrary, the owner of a general ship, carrying goods for hire, whether employed in internal, in coasting, or in foreign commerce, is a common carrier, with the liability of an insurer against all losses, except only such two irresistible causes as the act of God and public enemies. Molloy, bk. 2, c. 2, sec. 2; Bac. Ab. Carrier, A; Barclay *v.* Cucullay Gana, 3 Doug. 389; 2 Kent Com. 598, 599; Story on Bailments, sec. 501; The Niagara, 21 How. 7, 23; The Lady Pike, 21 Wall. 1, 14.

[1] For the remainder of the case, see page **197**.

In the present case the Circuit Court has found as facts: "The 'Montana' was an ocean steamer, built of iron, and performed regular service as a common carrier of merchandise and passengers between the ports of Liverpool, England, and New York, in the line commonly known as the Guion Line. By her, and by other ships in that line, the respondent was such common carrier. On March 2, 1880, the 'Montana' left the port of New York, on one of her regular voyages, bound for Liverpool, England, with a full cargo, consisting of about twenty-four hundred tons of merchandise, and with passengers." The bills of lading, annexed to the answer and to the findings of fact, show that the four shipments in question amounted to less than one hundred and thirty tons, or hardly more than one twentieth part of the whole cargo. It is clear, therefore, upon this record, that the appellant is a common carrier, and is liable as such, unless exempted by some clause in the bills of lading. . . .

McARTHUR & HURLBERT *v.* SEARS.

21 Wend. (N. Y. Sup. Ct.) 190. 1839.

Cowen, J. . . . . .

The defendant was a common carrier; and it is not denied as a general rule, that, to protect himself from responsibility for the loss, he was bound to prove that it arose from the act of God, or the enemies of the country. To the latter, the proof offered makes no pretensions; and it was thrown out in argument that the former part of the rule has no application to carriers navigating the dangerous waters of Lake Erie. No such local exception is known to the law of England or Scotland, whatever the general dangers of navigation. 2 Kent's Com. 597, 607, 608, 3 ed. Nor can it be indulged with safety either in principle or practice. No such exception has been made by any case in this State; nor am I aware that it has ever been contended for, though there have been several closely litigated suits for losses by carriers upon our Great Lakes. I do not find that it has been recognized by any case in the neighboring States; and distinctions in favor of carriers by water generally, which have been countenanced in one case, Aymar *v.* Astor, 6 Cowen, 266, by a dictum of the late Chief Justice of this State, and by two or three cases in Pennsylvania, have been treated as ardmitted anomalies, to be disappointed as contrary to decisions in neighboring States, and even in our own. Story on Bailm. 323, § 497; 2 Kent's Com. 607, 608, 3 ed.; Crosby *v.* Fitch, 12 Conn. R. 419. In Elliott *v.* Rozell, 10 Johns. R. 1, the rule was applied to the navigation of the river St. Lawrence in sloops, late in the season, between Ogdensburgh and Montreal, which was known by the

shippers to be very dangerous: see also Kemp *v.* Coughtry, 11 Johns. R. 107; Colt *v.* M'Mechen, 6 Johns. R. 160; Harrington *v.* Lyles, 2 Nott. & M. 88, 89, and the cases there cited. Williams *v.* Grant, 1 Conn. R. 487, and several cases hereafter cited. Bell *v.* Reed, 4 Binn. 127, was like the one at bar, a case of navigation on Lake Erie, and proceeded throughout on the assumption that defendants must, in order to excuse the loss, prove the utmost care in themselves and convince the jury that the loss arose from the act of God.

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HALL *v.* RENFRO.

3 Metc. (Ky.) 51. 1860.

Duvall, J. . . . The testimony shows conclusively that the defendant was, at the time the alleged loss occurred, the keeper of a public ferry, or that he held himself out to the world as such. Upon this point there is no contradiction or even contrariety in the proof.

Did he thereby subject himself to the obligations and liabilities of a common carrier? The authorities are conclusive of this question.

In the case of Robertson & Co. *v.* Kennedy, 2 Dana, 430, a common carrier is defined to be, "one who undertakes, for hire or reward, to transport the goods of all such as choose to employ him from place to place;" that draymen, cartmen, etc., who undertake to carry goods for hire as a common employment, from one part of a town to another, come within the definition; and that the mode of transportation is immaterial. Public ferrymen, or those who hold themselves out as such, are undoubtedly common carriers. "The owner of a private ferry may so use it (although on a road not opened by public authority, or repaired by public labor) as to subject himself to the liabilities of a common carrier; and he does do so if he notoriously undertakes for hire, to convey across the river, all persons indifferently, with their carriages and goods." Angell on the Law of Carriers, sec. 82.

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THE NEAFFIE.

1 Abbott (U. S. C. C.), 465. 1870.

Woods, C. J. The business of "The Neaffie," as the evidence shows, is to tow flats and other water-craft from one point to another in and about the harbor of the city of New Orleans. The hire for her services varies according to the bargain made at the time the service is rendered.

A common carrier is often defined to be: "One who undertakes for hire to transport the goods of such as choose to employ him from point to point." This definition is very broad, and in its application to facts is subject to certain limitations. A better and more precise definition is, "One who offers to carry goods for any person between certain termini or on a certain route, and who is bound to carry for all who tender him goods and the price of carriage." Was "The Neaffie" a common carrier under either of these definitions?

Chief Justice Marshall, in Boyce *v.* Anderson, 2 Pet. 150, says, "The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in cases to which it has been applied, we admit its necessity and its policy, we do not think it ought to be carried further or applied to new cases." So unless the case of steam-tugs towing boats and their cargoes can be brought strictly within the definition of common carriers, I am not disposed to apply to them the great rigor of the law applicable to common carriers. Can it be said that the tug-boats plying in the harbor of New Orleans undertake to transport the goods found on the water-craft which they take in tow? It appears to me that it is the boat in which the goods are put that undertakes to transport them. The tug only furnishes the motive-power. It is like the case of the owner of a wagon laden with merchandise hiring another to hitch his horses to the wagon to draw it from one point to another, the owner of the wagon riding in it, and having charge of the goods. In such a case, could it be claimed with any show of reason that the owner of the team was a common carrier? The reason of the law which imposes upon the common carrier such rigorous responsibility fails in such a case. The tug-boats plying in New Orleans harbor do not receive the property into their custody, nor do they exercise any control over it other than such as results from the towing of the boat in which it is laden. They neither employ the master and hands of the boat towed, nor do they exercise any authority over them beyond that of occasionally requiring their aid in governing the flotilla. The boat, goods, and other property remain in charge and care of the master and hands of the boat towed. In case of loss by fire or robbery, without any actual default on the part of the master or crew of the tow-boat, it can be hardly contended they would be answerable, and yet carriers would be answerable for such loss.

That tow-boats are not common carriers has been held in the following cases: Caton *v.* Rumney, 13 Wend. 387; Alexander *v.* Greene, 3 Hill, 9; Wells *v.* Steam Navigation Co., 2 Comst. 204; Pennsylvania, D. & M. Steam Nav. Co. *v.* Dandridge, 8 Gill & J. 248; Leonard *v.* Hendrickson, 18 Penn. St. 49. In Vanderslice *v.* The Superior, 13 Law Rep. 399, Mr. Justice Kane held a steam tow-boat liable as a common carrier; but when the case came before the Circuit Court, Mr. Justice Grier said he could not assent to the doc-

trine. I am aware that a contrary doctrine had been applied by the Supreme Court of Louisiana to steam-tugs towing between the city of New Orleans and the mouth of the Mississippi River. These tow-boats are distinguishable from those plying in the harbor of New Orleans; but if it were otherwise, I think the weight of authority and reason is with those who hold tow-boats not to be common carriers.

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COUP *v.* WABASH, ETC. RY. CO.

56 Mich. 111. 1885.

CAMPBELL, J. Plaintiff, who is a circus proprietor, sued defendant as a carrier for injuries to cars and equipments, and to persons and animals caused by a collision of two trains made up of his circus cars, while in transit through Illinois. The court below held defendant to the common-law liability of a common carrier, and held there was no avoiding liability by reason of a special contract under which the transportation was directed. The principal questions raised on the trial arose out of discussions concerning the nature of defendant's employment, and questions of damage. Some other points also appeared. In the view which we take of the case, the former become more important, and will be first considered.

Plaintiff had a large circus property, including horses, wild animals, and various paraphernalia, with tents and appliances for exhibition. . . .

The defendant company has an organized connection, under the same name, with railways running between Detroit and St. Louis, through Indiana and Illinois. On the 25th of July, 1882, a written contract was made at St. Louis by defendant's proper agent with plaintiff to the following effect. Defendant was to furnish men and motive-power to transport the circus by train of one or more divisions, consisting of twelve flat, six stock, one elephant, one baggage, and three passenger coaches, being in all twenty-three cars from Cairo to Detroit with privilege of stopping for exhibition at three places named, fixing the time of starting from each place of exhibition, leaving Cairo August 19th, Delphi, August 21st, Columbia City, August 22d, exhibiting at Detroit August 23d, and then to be turned over to the Great Western Transfer Line boats. Plaintiff was to furnish his own cars, and two from another company at Cairo, in good condition and running order. It was agreed that "for the use of the said machinery, motive-power, and men, and the privileges above enumerated, plaintiff should pay $400 for the run to Delphi, $175 to Columbia City, and $225 to Detroit, each sum to be paid before leaving each point of departure."

It was further expressly stipulated that the agreement was not

made with defendant as a carrier, but merely "as a hire of said machinery, motive-power, and right of way, and the men to move and work the same; the same to be operated under the management, direction, orders, and control of said party of the second part (plaintiff) or his agent, as in his possession, and by means of said employees as his agents, but to run according to the rules, regulations, and time-tables of the said party of the first part."

The contract further provides that defendant should not be responsible for damage by want of care in the running of the cars or otherwise, and for stipulated damages in case of any liability. It also provided for transporting free on its passenger trains two advertising cars and advertising material.

The plaintiff's cars were made up in two trains at Cairo, and divided to suit instructions. The testimony tended to prove that two cars were added to the forward train by order of plaintiff's agent, but in the view we take the question who did it is not important. The forward train was for some cause on which there was room for argument brought to a stand-still, and run into by the other train and considerable damage done by the collision.

Defendant insisted that plaintiff made out no cause for recovery, and that the contract exempted them. Plaintiff claimed, and the court below held the exemption incompetent.

Unless this undertaking was one entered into by the defendant as a common carrier, there is very little room for controversy. The price was shown to be only ten per cent of the rates charged for carriage, and the whole arrangement was peculiar. If it was not a contract of common carriage, we need not consider how far in that character contracts of exemption from liability may extend. In our view it was in no sense a common carrier's contract, if it involved any principle of the law of carriers at all.

The business of common carriage, while it prevents any right to refuse the carriage of property such as is generally carried, implies, especially on railroads, that the business will be done on trains made up by the carrier and running on their own time. It is never the duty of the carrier, as such, to make up special trains on demand, or to draw such trains made up entirely by other persons or by their cars. It is not important now to consider how far, except as to owners of goods in the cars forwarded, the reception of cars, loaded or unloaded, involves the responsibility of carriers as to the owners of the cars as such. The duty to receive cars of other persons, when existing, is usually fixed by the railroad laws, and not by the common law. But it is not incumbent upon companies in their duty as common carriers to move such cars except in their own routine. They are not obliged to accept and run them at all times and seasons, and not in the ordinary course of business.

The contract before us involves very few things ordinarily undertaken by carriers. The trains were to be made up entirely of cars

which belonged to plaintiff, and which the defendant neither loaded nor prepared, and into the arrangement of which, and the stowing and placing of their contents, defendant had no power to meddle. The cars contained horses which were entirely under control of plaintiff, and which, under any circumstances, may involve special risks. They contained an elephant, which might very easily involve difficulty, especially in case of accident. They contained wild animals which defendant's men could not handle, and which might also become troublesome and dangerous. It has always been held that it is not incumbent on carriers to assume the burden and risks of such carriage.

The trains were not to be run at the option of the defendant, but had short routes and special stoppages, and were to be run on some part of the road chiefly during the night. They were to wait over for exhibitions, and the times were fixed with reference to these exhibitions, and not to suit the defendant's convenience. There was also a divided authority, so that while defendant's men were to attend to the moving of the trains, they had nothing to do with loading and unloading cars, and had no right of access or regulation in the cars themselves.

It cannot be claimed on any legal principle that plaintiff could, as a matter of right, call upon defendant to move his trains under such circumstances and on such conditions, and if he could not, then he could only do so on such terms as defendant saw fit to accept. It was perfectly legal and proper, for the greatly reduced price, and with the risks and trouble arising out of moving peculiar cars and peculiar contents on special excursions and stoppages, to stipulate for exemption from responsibility for consequences which might follow from carelessness of their servants while in this special employment. How far, in the absence of contract, they would be liable in such a mixed employment, where plaintiff's men as well as their own had duties to perform connected with the movement and arrangement of the business, we need not consider.

It is a misnomer to speak of such an arrangement as an agreement for carriage at all. It is substantially similar to the business of towing vessels, which has never been treated as carriage. It is, although on a larger scale, analogous to the business of furnishing horses and drivers to private carriages. Whatever may be the liability to third persons who are injured by carriages or trains, the carriage-owner cannot hold the persons he employs to draw his vehicles as carriers. We had before us a case somewhat resembling this in more or less of its features in Mann *v.* White River Log & Booming Co., 46 Mich. 38, where it was sought to make a carrier's liability attach to log-driving, which we held was not permissible. All of these special undertakings have peculiar features of their own, but they cannot be brought within the range of common carriage.

It is therefore needless to discuss the other questions in the case, which involve several rulings open to criticism. We think the defendant was not liable in the action, and it should have been taken from the jury, and a verdict ordered of no cause of action.

The judgment must be reversed and a new trial granted.

BUCKLAND *v.* ADAMS EXPRESS CO.

97 Mass. 124. 1867.

CONTRACT to recover the value of a case of pistols. In the Superior Court judgment was entered for the plaintiffs on agreed facts; and the defendants appealed to this court.

BIGELOW, C. J. We are unable to see any valid reason for the suggestion that the defendants are not to be regarded as common carriers. The name or style under which they assume to carry on their business is wholly immaterial. The real nature of their occupation and of the legal duties and obligations which it imposes on them is to be ascertained from a consideration of the kind of service which they hold themselves out to the public as ready to render to those who may have occasion to employ them. Upon this point there is no room for doubt. They exercise the employment of receiving, carrying, and delivering goods, wares, and merchandise for hire on behalf of all persons who may see fit to require their services. In this capacity they take property from the custody of the owner, assume entire possession and control of it, transport it from place to place, and deliver it at a point of destination to some consignee or agent there authorized to receive it. The statement embraces all the elements essential to constitute the relation of common carriers on the part of the defendants towards the persons who employ them. Dwight *v.* Brewster, 1 Pick. 50, 53 [16]; Lowell Wire Fence Co. *v.* Sargent, 8 Allen, 189; 2 Redfield on Railways, 1-16.

But it is urged in behalf of the defendants that they ought not to be held to the strict liability of common carriers, for the reason that the contract of carriage is essentially modified by the peculiar mode in which the defendants undertake the performance of the service. The main ground on which this argument rests is, that persons exercising the employment of express carriers or messengers over railroads and by steamboats cannot, from the very nature of the case, exercise any care or control over the means of transportation which they are obliged to adopt, that the carriages and boats in which the merchandise intrusted to them is placed, and the agents or servants by whom they are managed, are not selected by them nor subject to their direction or supervision; and that the rules of common law, regulating the duties and liabilities of carriers, having been adapted

to a different mode of conducting business, by which the carrier was enabled to select his own servants and vehicles and to exercise a personal care and oversight of them, are wholly inapplicable to a contract of carriage by which it is understood between the parties that the service is to be performed, in part, at least, by means of agencies over which the carrier can exercise no management or control whatever. But this argument, though specious, is unsound. Its fallacy consists in the assumption that at common law, in the absence of any express stipulation, the contract with an owner or consignor of goods delivered to a carrier for transportation necessarily implies that they are to be carried by the party with whom the contract is made, or by servants or agents under his immediate direction and control. But such is not the undertaking of the carrier. The essence of the contract is that the goods are to be carried to their destination unless the fulfilment of this undertaking is prevented by the act of God or the public enemy. This, indeed, is the whole contract, whether the goods are carried by land or water, by the carrier himself or by agents employed by him. The contract does not imply a personal trust, which can be executed only by the contracting party himself or under his supervision by agents and means of transportation directly and absolutely within his control. Long before the discovery of steam-power, a carrier who undertook to convey merchandise from one point to another was authorized to perform the service through agents exercising an independent employment, which they carried on by the use of their own vehicles and under the exclusive care of their own servants. It certainly never was supposed that a person who agreed to carry goods from one place to another by means of wagons or stages could escape liability for the safe carriage of the property over any part of the designated route by showing that a loss happened at a time when the goods were placed by him in vehicles which he did not own, or which were under the charge of agents whom he did not select or control. The truth is that the particular mode or agency by which the service is to be performed does not enter into the contract of carriage with the owner or consignor. The liability of the carrier at common law continues during the transportation over the entire route or distance over which he has agreed to carry the property intrusted to him. And there is no good reason for making any distinction in the nature and extent of this liability attaching to carriers, as between those who undertake to transport property by the use of the modern methods of conveyance, and those who performed a like service in the modes formerly in use. If a person assumes to do the business of a common carrier, he can, if he sees fit, confine it within such limits that it may be done under his personal care and supervision or by agents whom he can select and control. But if he undertakes to extend it further, he must either restrict his liability by a special contract or bear the responsibility which the law affixes

to the species of contract into which he voluntarily enters. There is certainly no hardship in this, because he is bound to take no greater risk than that which is imposed by law on those whom he employs as his agents to fulfil the contracts into which he has entered.

It is not denied that in the present case the goods were lost or destroyed while they were being carried over a portion of the route embraced in the contract with the plaintiffs, and before they had reached the point to which the defendants had agreed to carry them. It is not a case where the agreement between the parties was that the merchandise was to be delivered over by the defendants to other carriers at an intermediate point, thence to be transported over an independent route to the point of destination without further agency on the part of the defendants. The stipulation was that the defendants should carry the property from the place where they received it to the point where it was to be delivered into the hands of the consignee. The loss happened before the defendants had fulfilled their promise.

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Judgment for plaintiff.[1]

ROBERTS *v.* TURNER.

12 Johns. (N. Y. Sup. Ct.) 231. 1814.

This was an action on the case, against the defendant, as a common carrier.

The defendant resided at Utica, and pursued the business of forwarding merchandise and produce from Utica to Schenectady and Albany. The ordinary course of this business is, for the forwarder to receive the merchandise or produce at his store, and send it by the boatman, who transports goods on the Mohawk River, or by wagon to Schenectady or Albany, for which he is paid at a certain rate per barrel, etc.; and his compensation consists in the difference between the sum which he is obliged to pay for transportation, and that which he receives from the owner of the goods.

The defendant received from the plaintiff, who resided in Cazenovia, in Madison County, by Aldrich, his agent, twelve barrels of pot ashes, to be forwarded to Albany, to Trotter; the ashes were put on board a boat, to be carried down the Mohawk to Schenectady, and whilst proceeding down the river, the boat ran against a bridge and sunk, and the ashes were thereby lost.

The defendant's price for forwarding goods to Schenectady was

[1] Dickinson, J., delivered an opinion on Roberts *v.* Turner, which follows.

twelve shillings per barrel, and the price which he had agreed to pay for the transporting the goods in question to that place was eleven shillings; the defendant had no interest in the freight of the goods, and was not concerned as an owner in the boats employed in the carriage of merchandise.

The judge being of the opinion that the testimony did not make out the defendant to be a common carrier, nonsuited the plaintiff; and a motion was made to set aside the nonsuit.

Spencer, J. On the fullest reflection, I perceive no grounds for changing the opinion expressed at the circuit. The defendant is in no sense a common carrier, either from the nature of his business, or any community of interest with the carrier. Aldrich, who, as the agent of the plaintiff, delivered the ashes in question to the defendant, states the defendant to be a forwarder of merchandise and produce from Utica to Schenectady and Albany; and that he delivered the ashes, with instructions from the plaintiff to send them to Colonel Trotter.

The case of a carrier stands upon peculiar grounds. He is held responsible as an insurer of the goods, to prevent combinations, chicanery, and fraud. To extend this rigorous law to persons standing in the defendant's situation, it seems to me, would be unjust and unreasonable. The plaintiff knew, or might have known (for his agent knew), that the defendant had no interest in the freight of the goods, owned no part of the boats employed in the carriage of goods, and that his only business in relation to the carriage of goods consisted in forwarding them. That a person thus circumstanced should be deemed an insurer of goods forwarded by him, an insurer too, without reward, would, in my judgment, be not only without a precedent, but against all legal principles. Lord Kenyon, in treating of the liability of a carrier (5 T. R. 394), makes this criterion to determine his character; whether, at the time when the accident happened, the goods were in the custody of the defendants as common carriers. In Garside *v.* The Proprietors of the Trent and Mersey Navigation (4 T. R. 581), the defendants, who were common carriers, undertook to carry goods from Stoneport to Manchester, and thence to be forwarded to Stockport, and were put into the defendants' warehouse, and burnt up before an opportunity arrived to forward them. Lord Kenyon held, the defendants' character of carriers ceased when the goods were put into the warehouse. This case is an authority for saying that the responsibilities of a common carrier and forwarder of goods rest on very different principles.

In the present case, the defendant performed his whole undertaking; he gave the ashes in charge to an experienced and faithful boatman.

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TRANSPORTATION CO. *v.* BLOCH BROTHERS.

86 Tenn. 392. 1888.

Caldwell, J. This action was brought in the Circuit Court of Davidson County, by Bloch Bros., against the Merchants' Dispatch Transportation Co., as a common carrier, to recover the value of a certain case of merchandise. Verdict and judgment were for the plaintiffs, and the defendant has appealed in error. . . .

The contention of the defendant in the court below was, that these stipulations in the bill of lading relieved it from liability for the loss of plaintiffs' goods, and the charge of the Trial Judge with respect thereto is now assailed as erroneous. . . .

This instruction properly treats the defendant as a common carrier. The duties which it undertakes, and which it holds itself out to the public as willing to undertake and perform, give it that character. In very many cases it has been expressly adjudged to be a common carrier, and in others such has been assumed to be its character without a discussion of the question. We cite a few of these cases: Merchants' Dispatch Transportation Co. *v.* Comforth, 3 Colo. 280 (25 Am. R. 757); 45 Iowa, 470; 47 Iowa, 229; id. 247; id. 262; 80 Ill. 473; 89 Ill. 43; id. 152.

The text-writers say that despatch companies are common carriers, and class them with express companies because of the many points of similarity in their business, and the fact that they alike generally use the vehicles of others in the transportation of freight. Lawson on Contracts of Carriers, sec. 233; Hutchinson on Carriers, sec. 72.

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c. *Baggage of Passengers.*

ORANGE COUNTY BANK *v.* BROWN.

9 Wend. (N. Y. Sup. Ct.) 85. 1832.

This was an action on the case.

The suit was brought against the defendants as the owners of a steamboat called the "Constellation," for the loss of a trunk belonging to a passenger on board the boat, who was the agent of the plaintiffs and intrusted with the carriage of $11,250 from the city of New York to the banking house of the plaintiffs, in the village of Goshen. The declaration contained a count reciting that the defendants, on the 15th of November, 1827, were the owners or pro-

prietors of a steamboat called the "Constellation," navigated on the Hudson River, between the cities of New York and Albany, for the carriage, conveyance, and transportation of passengers and their baggage and effects, for hire and reward, commonly called passage-money; touching upon the passage from New York to Albany at the village of Newburgh, for the purpose of landing passengers and their baggage or effects; that on the said 15th day of November, in the year, etc., one William Phillips, as the agent of the plaintiffs, at the special instance and request of the defendants, delivered to R. G. Cruttenden, then being master of the "Constellation," the trunk or baggage of him the said William Phillips, containing divers goods and chattels of them the plaintiffs, — to wit, bank notes amounting in the aggregate to the sum of $11,250, — to be safely and securely carried and conveyed in the said vessel from the city of New York to the village of Newburgh, for hire and reward then and there paid to Cruttenden as such master of the boat and agent of defendants, in that behalf. It is then averred that although the vessel on the same day arrived at Newburgh, yet that the defendants and their agent, not regarding their duty, did not deliver the said trunk or baggage containing the said bank notes to the said Phillips, but so negligently, carelessly, and improperly conducting the carriage and conveyance thereof that for want of due care in the defendants and their agents, the trunk containing the bank notes aforesaid was wholly lost to the plaintiffs, to wit, at, etc. The declaration contained various other counts. The defendants pleaded the general issue.

On the trial of the cause, William Phillips was sworn as a witness on the part of the plaintiffs, and testified that in November, 1827, he went on board the "Constellation" at the city of New York, with the intention of proceeding to Newburgh, that on the wharf near the boat he met Cruttenden, the master of the boat, and told him that he had *a trunk of importance* which he wanted to put into the office. Cruttenden answered, "as soon as we get under weigh;" to which he replied that he wanted it in immediately, as he wished to go ashore. Cruttenden then told him to go to the young man or mate. He accordingly went to the office and spoke to a young man who appeared to be doing business there, and told him he had a trunk of importance which he wished to put into the office. The young man made the same answer as the master: "as soon as we get under weigh." The witness said he wished to go ashore, and was then told, "Come round to the door; you may put it there," pointing to a place behind the door. The witness deposited the trunk in the place pointed out, and went on shore, and was absent eight or ten minutes. While on shore he bought some oranges, which he held in a handkerchief until the boat got under weigh, when he went to the office to put the oranges into the trunk, and found that it was gone. He immediately apprised the master and the clerk of the fact; search

was made, but the trunk could not be found. He testified that there were in his trunk, when he went on board, *seven sealed packages of bank notes*, received by him from the first teller of the Bank of America, and which he had been requested by the president of the Bank of Orange County to carry to that bank from the Bank of America. When he received the packages, the president of the Bank of Orange County told him that it was his practice when he had charge of packages of money to carry to Goshen, to deliver them to the captain of the steamboat immediately upon going on board, and advised him to follow the same course, which he, the witness, considered as a direction to him, and acted accordingly. On his cross-examination, he said he did not inform the clerk that his trunk contained bank bills, nor did he tell Cruttenden, the master of the boat, that it contained anything more than his own property; nor did he tell him that he was going to Newburgh. It was satisfactorily proved that the packages contained $11,250.

The plaintiffs having rested, the defendants' counsel moved for a nonsuit on various grounds. The presiding judge ruled that the liability of the defendants rested on the general law respecting carriers; that it admitted of some doubt whether the risk in this case commenced until the commencement of the voyage; that it was matter of doubt whether the defendants, in the case of mere baggage, were insurers for more than the property of the passenger; in most cases it would be a risk without compensation, which was not in the spirit of the law; that when a carrier is to be made liable for bank bills, not made up in a package pointing to its contents, common justice required that he should be informed of the nature of his charge, so that he might take the necessary precautions for the safety of the bills and for his own protection; that in his opinion the information of Phillips to the master of the boat of the value and contents of the trunk, was not, under all the circumstances of the case, sufficient to entitle the plaintiff to recover, and on that ground he directed a nonsuit. A nonsuit was accordingly entered, which the plaintiffs now move to set aside.

NELSON, J. This case is peculiar in many of its features, and must be determined by a recurrence to some of the general and fundamental principles which govern actions of this kind. The rule of the common law in relation to common carriers has been frequently pronounced a rigorous one, and its vindication by Lord Holt affords abundant evidence, if any were wanting, of the truth of the observation. He says, in Lane *v.* Coulton, 1 Vin. Abr. 219, though one may think it a hard case that a poor carrier that is robbed on the road, without any manner of default in him, should be answerable for all the goods he takes, yet the inconveniency would be far more intolerable if it were not so, for it would be in his power to combine with robbers, or to pretend a robbery or some other accident, without a possibility of a remedy to the party, and the law will not

expose him to so great a temptation. This reason, which I believe is the only one that has ever been given for the origin of the rule, and which probably had much foundation in fact in the early and rude age in which it must have been established, it is obvious, at this day, is nearly as applicable to every person intrusted with the property of another, as it is to the common carrier. In proportion, however, to the rigor of the liability, was exacted the compensation for it and the means of enforcing payment, which affords a sort of equivalent for the harshness of the rule. Accordingly we find it frequently laid down in actions of this kind, as a fundamental proposition, that the common carrier is liable in respect to his reward, and that the compensation should be in proportion to the risk. So strictly was this rule adhered to that it was repeatedly decided by Lord Holt that the hackney coachman was not liable for the travelling trunk of the passenger which was lost, unless a distinct price had been paid for the trunk as well as the person; and where it was the custom of the stagecoach for passengers to pay for baggage above a certain weight, the coachman was responsible only for the loss of goods beyond such weight. 1 Vin. Abr. 220, and cases there cited. So in the analogous case of the innkeeper, if a guest stops at an inn, and departs for a few days, leaving his goods, if they are stolen during his absence, the landlord is not liable as innkeeper, for at the time of the loss the owner was not his guest, and he had no benefit from the keeping of the goods. Cro. Jac. 188; 1 Vin. Abr. 225. It has since been determined that the stage coachman is responsible for the baggage of the passenger, though no distinct price was paid for it, upon the ground, however, still consistent with the principle of the above cases; to wit, that the reward for carrying the same was included in the fare for carrying the passenger. 1 Wheaton's Selwyn, 301, n. 1.

Now, upon the ground that the defendants in this case have received no compensation or reward from the plaintiffs or any other person for the transportation or risk of the money in question, and that they were deprived of such reward by the unfair dealing of the agent of the plaintiffs with the defendants, I am of opinion the plaintiffs cannot recover, and that they were properly nonsuited upon the trial. As a general rule where there has been no qualified acceptance of goods by special agreement, or where an agreement cannot be inferred from notice, the carrier is bound to make inquiry as to the value of the box or article received, and the owner must answer truly at his peril; and if such inquiries are not made, and it is received at such price for transportation as is asked with reference to its bulk, weight, or external appearance, the carrier is responsible for the loss, whatever may be its value. If he has given general notice that he will not be liable over a certain amount, unless the value is made known to him at the time of delivery and a premium for insurance paid, such notice, if brought home to the knowledge

of the owner (and courts and juries are liberal in inferring such knowledge from the publication of the notice), is as effectual in qualifying the acceptance of the goods as a special agreement, and the owner, at his peril, must disclose the value, and pay the premium. The carrier in such case is not bound to make the inquiry, and if the owner omits to make known the value, and does not therefore pay the premium at the time of delivery, it is considered as dealing unfairly with the carrier, and he is liable only to the amount mentioned in his notice, or not at all, according to the terms of his notice. 1 Wheaton's Selw. 305, 306, 308, and notes; 6 Com. L. R. 333; 4 Burr. 2298; 5 Com. L. R. 476; 8 Pick. 182; 11 Com. L. R. 243.

In this case no notice has been given by the defendants limiting their responsibility, and they are no doubt liable to the full value of the luggage of the passenger lost, or of the goods lost, which they had received without any special agreement, qualifying the risk for transportation. The defendants cannot succeed upon this ground. But in the absence of notice, if any means are used to conceal the value of the article, and thereby the owner avoids paying a reasonable compensation for the risk, this unfairness and its consequence to the defendants, upon the principles of common justice as well as those peculiar to this action, will exempt them from the responsibility; for such a result is alike due to the defendants, who have received no reward for the risk, and to the party who has been the cause of it by means of disingenuous and unfair dealing. Thus, where the plaintiff delivered to the carrier a box, telling him there was a book and tobacco in it, when it contained one hundred pounds, and it was lost, he should not recover. It is true that in such a case a party did recover, though Rolle, C. J., considered it a cheat; but it is clear that at this day he could not recover. 4 Burr. 2301.

So where a box, in which there was a large sum of money, was brought to a carrier, who inquired its contents, and was answered it was filled with silk, upon which it was taken and lost, it was held the owner could not recover. *Ibid.* So where a bag sealed was delivered to a carrier, and was said to contain two hundred pounds, and a receipt was given for the same, when, in fact, it contained four hundred pounds, and it was lost, the carrier was held answerable only for the two hundred pounds, as the reward extended no farther. 4 Burr. 2301; Selw. 305 (n.) These cases all proceed upon the ground that the carrier is deprived of his reward for the extra value of the article, and consequent extra risk incurred, by means of the unfair if not fraudulent conduct of the owner, and therefore the rigor of the common-law rule is not applied to him, and he is only held responsible for the loss in case of gross negligence. If the defendants are to be made responsible to the plaintiffs through the medium and acts of their agent, who was employed to carry the money from New York to the bank, the plaintiffs also must be held

responsible to the defendant for his conduct; the obligation must be reciprocal. Instead of committing the several packages of money to the captain, which of themselves generally indicate their value, and in this case would have done so, as the figures (by which I understand the quantity of money in each package) could be seen upon them, and thereby enable the captain to exact a reasonable compensation for the risk, and apprise him of the necessity of greater care and caution in the safe conveyance of the money, which he naturally would bestow in proportion to the value, the agent of the plaintiffs put them into his trunk, and committed it to the captain as his baggage, affording no other indication of the value of its contents than that it was a trunk of importance. This was enough to attract the attention of the felon who might be standing by to its contents, but certainly was not calculated to afford information to the captain of the extraordinary character and value of those contents. The captain might understand he had a costly wardrobe and other necessaries and conveniences for travelling of great value, but not that the trunk contained eleven thousand dollars in bank bills, which the traveller was carrying for hire or friendship, and not as travelling expenses.

It may be difficult to define with technical precision what may legitimately be included in the term baggage, as used in connection with travelling in public conveyances; but it may be safely asserted that money, except what may be carried for the expenses of travelling, is not thus included, and especially a sum like the present, which was taken for the mere purpose of transportation. We have already seen that formerly so strict was the rule that the carrier was liable only in respect to the reward adhered to, that he was not held liable for the loss of the baggage of the passenger unless a distinct price was paid for it. The law is now very properly altered, as a reasonable amount of baggage, by custom or the courtesy of the carrier, is considered as included in the fare for the person; but courts ought not to permit this gratuity or custom to be abused, and under pretence of baggage to include articles not within the sense or meaning of the term, or within the object or intent of the indulgence of the carrier, and thereby defraud him of his just compensation, and subject him to unknown and illimitable hazards. If the amount of money in the trunk in this case is not fairly included under the term baggage, as used in the connection we here find it (and I cannot think it is), then the conduct of the agent was a virtual concealment of that sum; his representation of his trunk and the contents as baggage was not a fair one, and was calculated to deceive the captain; and it would be a violation of first principles to permit the plaintiffs to recover. The case of Miles *v.* Cattle *et al.*, 19 Com. L. R. 219, in some respects resembles this case. The plaintiff was going to L., and took a seat in a public conveyance. He had with him a bag labelled "T. Miles, traveller," containing clothes worth

about fifteen pounds. Before he started, G. delivered him a parcel containing a fifty-pound bank note, addressed to an attorney in L., which the plaintiff was desired to look at the defendants' office, and to be forwarded by the defendants to L. The plaintiff, instead of doing so, put the parcel in his own bag, intending to convey it to L. himself. If the parcel had been sent by the defendants, it would have cost four shillings and sixpence. The bag and contents were lost. The verdict was found for the fifteen pounds, with leave to apply to increase it, on the facts in the case, by adding the fifty pounds. The court denied the application, principally upon the ground that the plaintiff had no interest in the fifty pounds. But it was conceded by the court that the owner could not recover on the facts. Tindale, J., says, in violation of his trust the plaintiff thought proper not to deliver the parcel to the defendants, but to deposit it in his own bag; thereby depriving the owner of any remedy he might have had against the defendants, and the defendants of the sum they would otherwise have earned for the carriage of the parcel. In this case the president of the bank directed Phillips to commit the packages directly to the captain, and had he followed such directions, the captain would have been enabled to charge a reward for the carriage of the same, and the captain, or the defendants, would have been responsible for its safety. His omission to follow the directions was a violation of his trust, for which the defendants are not accountable.

It was decided in Sewall *v.* Allen *et al.*, in the Court of Errors, 6 Wend. 336, that the Dutchess and Orange Steamboat Company, and the members thereof, were not liable for the loss of packages of bank bills intrusted to the captain of the boat, on the ground that the carriage of bank bills was not within the ordinary business of the company; and so far as the usage extended, it was a personal trust committed to the captain, who alone received the compensation, or, in other words, the company were neither by their charter or usage under it, common carriers of bank bills. From the facts appearing in that case, I presume the principle here decided by the highest judicial tribunal in the State would be equally applicable to this company, though from the direction the cause took upon the trial, facts sufficient do not appear to raise the question. If so, it seems to me impossible to maintain the proposition that the defendants would be holden responsible for the loss of an article in the trunk of a passenger, which in no sense of the term can be considered a part of the baggage of the passenger, and for the transportation of which no compensation is received by the company, when, confessedly, they would not be accountable for the same article, if it had been committed directly to the care of the captain, and a reasonable reward paid him for transportation. It is said the difference between the cases consists in this, that in the one case it is a part of the baggage of the passenger, the carrying of which is

within the ordinary business of the company, and for which they receive the reward, and in the other it is a private transaction between the owner and the captain; the answer I think is, that putting the article in the trunk does not make it baggage. If it is included within that term, it is as much baggage when distinctly committed to the care of the captain as when in the trunk; the place in which it is cannot, in this instance, at least, vary the character of the article or the transaction; the object is the transportation of the money, without reference to a connection with the person of the passenger.

Having come to the conclusion upon what I view as the merits and principle of the case, that the plaintiffs cannot recover, it is unimportant to examine any other question discussed upon the argument.

Motion for a new trial denied.

RAILROAD COMPANY *v.* FRALOFF.

100 U. S. 24. 1879.

Error to the Circuit Court of the United States for the Southern District of New York.

Mr. Justice Harlan delivered the opinion of the court.

This is a writ of error to a judgment rendered against the New York Central and Hudson River Railroad Company, in an action by Olga de Maluta Fraloff to recover the value of certain articles of wearing apparel alleged to have been taken from her trunk while she was a passenger upon the cars of the company, and while the trunk was in its charge for transportation as part of her baggage.

There was evidence before the jury tending to establish the following facts: —

The defendant in error, a subject of the Czar of Russia, possessing large wealth, and enjoying high social position among her own people, after travelling in Europe, Asia, and Africa, spending some time in London and Paris, visited America in the year 1869, for the double purpose of benefiting her health and seeing this country. She brought with her to the United States six trunks of ordinary travel-worn appearance, containing a large quantity of wearing apparel, including many elegant, costly dresses, and also rare and valuable laces, which she had been accustomed to wear upon different dresses when on visits, or frequenting theatres, or attending dinners, balls, and receptions. A portion of the laces was made by her ancestors upon their estates in Russia. After remaining some weeks in the city of New York, she started upon a journey westward, going

first to Albany, and taking with her, among other things, two of the trunks brought to this country. Her ultimate purpose was to visit a warmer climate, and, upon reaching Chicago, to determine whether to visit California, New Orleans, Havana, and probably Rio Janeiro. After passing a day or so at Albany, she took passage on the cars of the New York Central and Hudson River Railroad Company for Niagara Falls, delivering to the authorized agents of the company for transportation as her baggage the two trunks above described, which contained the larger portion of the dress-laces brought with her from Europe. Upon arriving at Niagara Falls she ascertained that one of the trunks, during transportation from Albany to the Falls, had been materially injured, its locks broken, its contents disturbed, and more than two hundred yards of dress-lace abstracted from the trunk, in which it had been carefully placed before she left the city of New York. The company declined to pay the sum demanded as the value of the missing laces; and, having denied all liability therefor, this action was instituted to recover the damages which the defendant in error claimed to have sustained by reason of the loss of her property.

Upon the first trial of the case, in 1873, the jury, being unable to agree, was discharged. A second trial took place in the year 1875. Upon the conclusion of the evidence in chief at the last trial, the company moved a dismissal of the action, and, at the same time, submitted numerous instructions which it asked to be then given to the jury, among which was one peremptorily directing a verdict in its favor. That motion was overruled, and the court declined to instruct the jury as requested. Subsequently, upon the conclusion of the evidence upon both sides, the motion for a peremptory instruction in behalf of the company was renewed, and again overruled. The court thereupon gave its charge, to which the company filed numerous exceptions, and also submitted written requests, forty-two in number, for instructions to the jury. The court refused to instruct the jury as asked, or otherwise than as shown in its own charge. To the action of the court in the several respects indicated the company excepted in due form. The jury returned a verdict against the company for the sum of $10,000, although the evidence, in some of its aspects, placed the value of the missing laces very far in excess of that amount.

It would extend this opinion to an improper length, and could serve no useful purpose, were we to enter upon a discussion of the various exceptions, unusual in their number, to the action of the court in the admission and exclusion of evidence, as well as in refusing to charge the jury as requested by the company. Certain controlling propositions are presented for our consideration, and upon their determination the substantial rights of parties seem to depend. If, in respect of these propositions, no error was committed, the judgment should be affirmed without any reference to points of a

minor and merely technical nature, which do not involve the merits of the case, or the just rights of the parties.

In behalf of the company it is earnestly claimed that the court erred in not giving a peremptory instruction for a verdict in its behalf. This position, however, is wholly untenable. Had there been no serious controversy about the facts, and had the law upon the undisputed evidence precluded any recovery whatever against the company, such an instruction would have been proper. 1 Wall. 369; 11 How. 372; 19 id. 269; 22 Wall. 121. The court could not have given such an instruction in this case without usurping the functions of the jury. This will, however, more clearly appear from what is said in the course of this opinion.

The main contention of the company, upon the trial below, was that good faith required the defendant in error, when delivering her trunks for transportation, to inform its agents of the peculiar character and extraordinary value of the laces in question; and that her failure in that respect, whether intentional or not, was, in itself, a fraud upon the carrier, which should prevent any recovery in this action.

The Circuit Court refused, and, in our opinion, rightly, to so instruct the jury. We are not referred to any legislative enactment restricting or limiting the responsibility of passenger carriers by land for articles carried as baggage. Nor is it pretended that the plaintiff in error had, at the date of these transactions, established or promulgated any regulation as to the quantity or the value of baggage which passengers upon its cars might carry, without extra compensation, under the general contract to carry the person. Further, it is not claimed that any inquiry was made of the defendant in error, either when the trunks were taken into the custody of the carrier, or at any time prior to the alleged loss, as to the value of their contents. It is undoubtedly competent for carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk. And in order that such regulations may be practically effective, and the carrier advised of the full extent of its responsibility, and, consequently, of the degree of precaution necessary upon its part, it may rightfully require, as a condition precedent to any contract for the transportation of baggage, information from the passenger as to its value; and if the value thus disclosed exceeds that which the passenger may reasonably demand to be transported as baggage without extra compensation, the carrier, at its option, can make such additional charge as the risk fairly justifies. It is also undoubtedly true that the carrier may be discharged from liability for the full value of the passenger's baggage, if the latter, by

false statements, or by any device or artifice, puts off inquiry as to such value, whereby is imposed upon the carrier responsibility beyond what it was bound to assume in consideration of the ordinary fare charged for the transportation of the person. But in the absence of legislation limiting the responsibility of carriers for the baggage of passengers; in the absence of reasonable regulations upon the subject by the carrier, of which the passenger has knowledge; in the absence of inquiry of the passenger as to the value of the articles carried, under the name of baggage, for his personal use and convenience when travelling; and in the absence of conduct upon the part of the passenger misleading the carrier as to the value of his baggage, — the court cannot, as matter of law, declare, as it was in effect requested in this case to do, that the mere failure of the passenger, unasked, to disclose the value of his baggage, is a fraud upon the carrier, which defeats all rights of recovery. The instructions asked by the company virtually assumed that the general law governing the rights, duties, and responsibilities of passenger carriers, prescribed a definite, fixed limit of value, beyond which the carrier was not liable for baggage, except under a special contract or upon previous notice as to value. We are not, however, referred to any adjudged case, or to any elementary treatise which sustains that proposition, without qualification. In the very nature of things, no such rule could be established by the courts in virtue of any inherent power they possess. The quantity or kind or value of the baggage which a passenger may carry under the contract for the transportation of his person depends upon a variety of circumstances which do not exist in every case. "That which one traveller," says Erle, C. J., in Philpot *v.* Northwestern Railway Co., 19 C. B. N. S. 321, "would consider indispensable, would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind will be taken in the mind of the carrier when he receives a passenger for conveyance." Some of the cases seem to announce the broad doctrine that, by general law, in the absence of legislation, or special regulations by the carrier, of the character indicated, a passenger may take, without extra compensation, such articles adapted to personal use as his necessities, comfort, convenience, or even gratification may suggest; and that whatever may be the quantity or value of such articles, the carrier is responsible for all damage or loss to them, from whatever source, unless from the act of God or the public enemy. But that, in our judgment, is not an accurate statement of the law. Whether articles of wearing apparel, in any particular case, constitute baggage, as that term is understood in the law, for which the carrier is responsible as insurer, depends upon the inquiry whether they are such in quantity and value as passengers under like circumstances ordinarily or usually carry for personal use when travelling. "The implied undertaking," says Mr. Angell, "of the proprietors of stagecoaches, railroads, and steam-

boats to carry in safety the baggage of passengers is not unlimited, and cannot be extended beyond ordinary baggage, or such baggage as the traveller usually carries with him for his personal convenience." Angell, Carriers, sec. 115. In Hannibal Railroad *v.* Swift, 12 Wall. 272 [54], this court, speaking through Mr. Justice Field, said that the contract to carry the person "only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travellers for their personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations." To the same effect is a decision of the Queen's Bench in Macrow *v.* Great Western Railway Co., Law Rep. 6 Q. B. 121, where Chief Justice Cockburn announced the true rule to be "that whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage." 2 Parsons, Contr., 199. To the extent, therefore, that the articles carried by the passenger for his personal use exceed in quantity and value such as are ordinarily or usually carried by passengers of like station and pursuing like journeys, they are not baggage for which the carrier by general law is responsible as insurer. In cases of abuse by the passenger of the privilege which the law gives him, the carrier secures such exemption from responsibility, not, however, because the passenger, uninquired of, failed to disclose the character and value of the articles carried, but because the articles themselves, in excess of the amount usually or ordinarily carried, under like circumstances, would not constitute baggage within the true meaning of the law. The laces in question confessedly constituted a part of the wearing apparel of the defendant in error. They were adapted to and exclusively designed for personal use, according to her convenience, comfort, or tastes, during the extended journey upon which she had entered. They were not merchandise, nor is there any evidence that they were intended for sale or for purposes of business. Whether they were such articles in quantity and value as passengers of like station and under like circumstances ordinarily or usually carry for their personal use, and to subserve their convenience, gratification, or comfort while travelling, was not a pure question of law for the sole or final determination of the court, but a question of fact for the jury, under proper guidance from the court as to the law governing such cases. It was for the jury to say to what extent, if any, the baggage of defendant in error exceeded in quantity and value that which was usually carried without extra compensation, and to disallow any claim for such excess.

Upon examining the carefully guarded instructions given to the jury, we are unable to see that the court below omitted anything

essential to a clear comprehension of the issues, or announced any principle or doctrine not in harmony with settled law. After submitting to the jury the disputed question as to whether the laces were, in fact, in the trunk of the defendant in error, when delivered to the company at Albany for transportation to Niagara Falls, the court charged the jury, in substance, that every traveller was entitled to provide for the exigencies of his journey in the way of baggage, was not limited to articles which were absolutely essential, but could carry such as were usually carried by persons travelling, for their comfort, convenience, and gratification upon such journeys; that the liability of carriers could not be maintained to the extent of making them responsible for such unusual articles as the exceptional fancies, habits, or idiosyncrasies of some particular individual may prompt him to carry; that their responsibility as insurers was limited to such articles as it was customary or reasonable for travellers of the same class, in general, to take for such journeys as the one which was the subject of inquiry, and did not extend to those which the caprice of a particular traveller might lead that traveller to take; that if the company delivered to the defendant in error, aside from the laces in question, baggage which had been carried, and which was sufficient for her as reasonable baggage, within the rules laid down, she was not entitled to recover; that if she carried the laces in question for the purpose of having them safely kept and stored by the railroad companies and hotel-keepers, and not for the purpose of using them, as occasion might require, for her gratification, comfort, or convenience, the company was not liable; that if *any portion* of the missing articles were reasonable and proper for her to carry, and all was not, they should allow her the value of *that portion.*

Looking at the whole scope and bearing of the charge, and interpreting what was said, as it must necessarily have been understood both by the court and jury, we do not perceive that any error was committed to the prejudice of the company, or of which it can complain. No error of law appearing upon the record, this court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy therefore rested with the court below, under its general power to set aside the verdict. But that court finding that the verdict was abundantly sustained by the evidence, and that there was no ground to suppose that the jury had not performed their duty impartially and justly, refused to disturb the verdict, and overruled a motion for a new trial. Whether its action, in that particular, was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the

jury under instructions correctly defining the legal rights of parties. Parsons *v.* Bedford, 3 Pet. 446; 21 How. 167; Insurance Company *v.* Folsom, 18 Wall. 249.

It is, perhaps, proper to refer to one other point suggested in the elaborate brief of counsel for the company. Our attention is called to section 4281 of the Revised Statutes, which declares that "if any shipper of platina, gold, gold-dust, coins, jewelry, . . . trinkets, . . . silk in a manufactured or unmanufactured form, whether wrought up or not wrought up with any other material, furs or laces, or any of them, contained in any parcel, package, or bundle, shall lade the same as freight or baggage on any vessel, without, at the time of such lading, giving to the master, clerk, agent, or owner of such vessel receiving the same, a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessels shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any of such goods beyond the value and according to the character thereof, so notified and entered."

It is sufficient to say that the section has no application whatever to this case. It has reference alone to the liability of carriers by water who transport goods and merchandise of the kind designated. It has no reference to carriers by land, and does not assume to declare or restrict their liability for the baggage of passengers.

Judgment affirmed.

Mr. Justice Field, with whom concurred Mr. Justice Miller and Mr. Justice Strong, dissenting.

I dissent from the judgment of the court in this case. I do not think that two hundred and seventy-five yards of lace, claimed by the owner to be worth $75,000, and found by the jury to be of the value of $10,000, can, as a matter of law, be properly considered as baggage of a passenger for the loss of which the railroad company, in the absence of any special agreement, should be held liable.

KANSAS CITY, etc. R. CO. *v.* MORRISON.

34 Kan. 502. 1886.

On March 2, 1884, William Morrison filed his petition against the Kansas City, Fort Scott & Gulf Railroad Company, in the District Court of Labette County, to recover $495.12, with interest thereon from February 8, 1884, the alleged value of certain wearing apparel and tools. The petition also averred that the railroad company was a corporation operating a railroad from Fort Scott to Parsons,

and was a carrier of passengers between those points on February 8, 1884, and subsequent thereto; that the plaintiff on said date was a watchmaker and jeweller, and that the articles described in the petition constituted the tools necessarily used by him in carrying on his occupation; that on said February 8, the plaintiff was a passenger on the railroad from Fort Scott to Parsons, and at the same time delivered his trunk to the company to be carried as baggage between said points; that plaintiff arrived in Parsons on said day, and at once and on several occasions thereafter demanded of the company a delivery of his baggage, which was refused until February 23; that the trunk was delivered on that day, but that the wearing apparel and tools described in the petition were missing from it; and that such loss was caused by the negligence of the company.

Horton, C. J. . . . The evidence on the part of the railroad company established that the trunk reached Parsons on February 9, 1884; that it was apparently in good order when it arrived; that on February 15, the depot was burglarized, and the trunk broken open and robbed.

The jury found that the plaintiff demanded his trunk on February 9, 1884, and again demanded it on February 11; and these findings are supported by the evidence because the demand made by the porter of the Belmont, on the 11th, was the same as if plaintiff had made the demand, as the porter was acting for him and in his interest. Therefore we may omit from this case all discussion of the liability of the defendant below as warehouseman or bailee for hire. If plaintiff demanded his baggage, as testified to, and the company, having the trunk at its depot at Parsons, refused to deliver it, the company is responsible to the owner for its contents, although the trunk was subsequently broken open and robbed without its fault. The liability of the railroad company was co-extensive with its custody of the trunk, and continued until it was safely delivered into the hands of its owner, if the owner called for and demanded the trunk within a reasonable time after it reached Parsons. All of this was done by the owner. A. T. & S. F. Rld. Co. *v.* Brewer, 20 Kas. 670; C. R. I. & Pac. Rld. Co. *v.* Conklin, 32 id. 55; Thompson on Carriers, pp. 530–532.

We think, therefore, that there is only one principal question presented by the record for our determination; that is, whether the tools of plaintiff below are proper baggage for a watchmaker and jeweller. The general rule is, that the implied obligation of a common carrier to carry the baggage of a passenger does not extend beyond ordinary baggage; and it may be said generally that by baggage we are to understand such articles of personal convenience or necessity as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the trunks of passengers, which are not, however, designed for any such use, but for other purposes, such as a sale and the like. Story on

Bailments, 499; Hutchinson on Carriers, § 679. The decisions on the subject of passengers' baggage turn upon the question: What articles may baggage consist of? This is a mixed question of law and fact, to be determined by the jury under proper instructions from the court. In Macrow *v.* Railway Co., 2 L. R. 6 Q. B. 612, the question coming before the court as to what was properly included by the term baggage, the true rule was said by Cockburn, C. J., to be: —

"That whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage. This would include, not only all articles of apparel, whether for use or ornament, but also the gun case or fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveller, and the taking of which has arisen from the fact of his journeying. . . . But merchandise, or furniture, or household goods, would not come within the description of ordinary luggage, unless accepted as such by the carrier."

It is also held by the authorities that a reasonable quantity of his tools is proper baggage for a mechanic. Davis *v.* Railroad Co., 10 How. Pr. 330; Porter *v.* Hilderbrand, 14 Pa. St. 129. The case of Davis *v.* Railroad Co., *supra*, and Porter *v.* Hilderbrand, *supra*, are cited by Thompson in his work on Carriers, and also by Hutchinson in his book on the same subject; and are also referred to in other text-books without criticism or other unfavorable comment. Thompson on Carriers, 513; Hutchinson on Carriers, § 683.

These cases are quite similar to the one at bar, excepting that the tools in controversy are more valuable. In Davis *v.* Railroad Co., the contents of the trunk consisted of ordinary wearing apparel, a gun, and a set of harness-maker's tools, worth ten dollars. The plaintiff was a harness-maker by trade, and it was proved that it is usual for those of that trade, in going from place to place, to take their tools with them in their trunks. In Porter *v.* Hilderbrand, the plaintiff was a carpenter, and his trunk contained $45 of clothing and $55 of carpenters' tools. He was moving from Pennsylvania to the State of Ohio, and he delivered his trunk to the owners of a stage to carry it from Pittsburgh to Wooster, Ohio. In that case, the court speaking through Bell, J., said: —

"Another question disclosed by the record is, whether a recovery can be had for the value of the carpenters' tools, which the jury have found were a reasonable part of the plaintiff's baggage. . . . The right to carry tools as baggage is unquestionably open to abuse; but in the language of the court in McGill *v.* Rowand, 3 Barr. 451, the correction is to be found in the intelligence and integrity of the

jury called to determine under the circumstances of each case. It is, it is said, a common thing for journeymen mechanics to carry in their trunks, with clothing, a small and select portion of their tools. To this practice I see no such objection as ought to put this kind of property out of the protection afforded to the necessaries a traveller is compelled by legitimate considerations to transport with his person. Upon this score, the judgment rendered below is, I think, unobjectionable."

The evidence shows that plaintiff below was a watchmaker and jeweller; that he went to Parsons to work at watchmaking; that the tools in his trunk were intended for repairing watches and were necessary for his work; and that they were the tools usually carried by a person of his trade or occupation. The plaintiff is therefore, strictly speaking, a mechanic, and a reasonable quantity of his tools is proper baggage. The term "baggage" was fairly defined to the jury in the instructions of the court, and we do not think any of the instructions were misleading or prejudicial, although as a whole they were unnecessarily prolix. What was a reasonable quantity of tools for plaintiff below to carry, was a question for the jury.

The judgment of the District Court must be affirmed.[1]

GREAT NORTHERN RAILWAY, Appellant, *v.* SHEPHERD.

8 Exch. 30. 1852.

Parke, B. In this case, there being no special contract, the defendants were bound to carry the plaintiff and his luggage, which term, according to the true modern doctrine on the subject, comprises clothing and such articles as a traveller usually carries with him for his personal convenience; perhaps even a small present, or a book for the journey, might be included in the term; but certainly not merchandise or materials bought for the purpose of being manufactured and sold at a profit. Angell on Carriers, sec. 115; Story on

[1] In the case at bar, we are of opinion that the feather-bed was not a part of the personal baggage of the plaintiff, and that the defendants are not liable for it under their contract. The case finds that it was not intended for personal use during the voyage. It was an article of furniture, and it is difficult to see how it can any more properly be called personal baggage than any other article of household furniture. The presiding judge correctly ruled that, upon the facts proved, this was a question of law. Morton, J., in Connolly *v.* Warren, 106 Mass. 146. *Acc.:* Macrow *v.* Great Western R. Co., L. R. 6 Q. B. 612. *Contra:* Collett *v.* Henshaw, 35 Vt. 604, 612. The manuscript books of a student may be baggage: Hopkins *v.* Westcott, 6 Blatch. 64; so the "price book" of a travelling salesman: Gleason *v.* Transportation Co., 32 Wis. 85.

Bailments, 526, 5th ed. note. In this case, nine-tenths of the articles were of the latter description. Now, if the plaintiff had carried these articles exposed, or had packed them in the shape of merchandise, so that the company might have known what they were, and they had chosen to treat them as personal luggage, and carry them without demanding any extra remuneration, they would have been responsible for the loss. So also upon any limit in point of weight if the company chose to allow a passenger to carry more, they would be liable. The judge states, that there was no evidence as to whether defendants carried passengers by this excursion train upon the terms contained in the 6th section of the 7 & 8 Vict. c. 85, unless the court shall be of opinion that the fact that the charge for each passenger was less than a penny a mile was of itself sufficient proof that they carried upon those terms. That, however, it is not necessary to decide; because, assuming that they did not carry on those terms, the defendants only agreed for the stipulated fare to carry passengers and everything which constituted personal luggage, and were not bound to carry merchandise or articles wholly unconnected with luggage. If, indeed, they had notice, or might have suspected from the mode in which the parcels were packed that they did not contain personal luggage, then they ought to have objected to carry them; but the case finds that they had no notice of what the packages contained. Whether this was done for any fraudulent purpose, it is not necessary to inquire; because, even if there was no fraudulent intent, the plaintiff has so conducted himself that the company were not aware that he was not carrying luggage, and therefore the loss must be borne by him. It was contended that, after the accident happened, a new special contract was entered into, by which the company undertook to take care of the plaintiff's luggage. But this argument fails. If, indeed, an accident had happened to a perfect stranger, and the company had agreed without compensation to forward his luggage, they would, according to Coggs *v.* Bernard, be responsible for its loss. But in this case the plaintiff was a passenger, and the intention of the company was only to carry into effect the original contract; and from that alone their obligation arises. I am therefore of opinion that the company are not liable; and the judgment of the court below must be reversed.

MICHIGAN CENTRAL R. CO. *v.* CARROW.

73 Ill. 348. 1874.

Scott, J. . . . By common custom the personal luggage of the traveller is carried without extra charge. Passenger carriers do not assume to carry anything as baggage except such things as may be necessary to the convenience and comfort of the traveller, and perhaps sufficient money to defray the expenses of the journey. This fact is well known to all persons who seek passage in railway carriages. With a great majority of travellers the amount of baggage carried is of no considerable value. The companies have no arrangements for the carrying and safe keeping of costly articles. The contract is simply for passage and the usual personal baggage not exceeding in weight the amount prescribed by the regulations of the company.

If this implied contract with the carrier of passengers is to be varied, modified, or enlarged, it must be by direct notice of the contents of the package offered as baggage which, in effect, would amount to a special contract. The company may rely upon the representation that whatever is offered as baggage is that, and nothing else. The law seems to be settled that it need not inquire as to its contents. If the passenger has merchandise checked as baggage without such notice, the company cannot be held liable as a common carrier. Cahill *v.* L. & N. W. Ry. Co., 10 C. B. n. s. 154; Chicago & Cincinnati Air Line R. R. Co. *v.* Marcus, *supra;* Collins *v.* Boston & Maine R. R. Co., 10 Cush. 506; Great Northern Railroad Co. *v.* Shepherd, 8 W. H. & G. 30 [50]; Batson *v.* Donovan, 4 B. & A. 21.

Upon the doctrine of these cases, it is very clear appellant was not a common carrier of the goods destroyed. Appellee gave the agents of the company no notice whatever his trunk contained valuable merchandise. No one knew better than appellee the company did not carry merchandise as baggage, free of charge, and without notice of the contents of the trunk there is neither reason nor authority for holding the company liable as an insurer against loss. In Cahill *v.* L. & N. W. Ry. Co., *supra*, Willis, J., very aptly remarks that "where a passenger takes a ticket at the ordinary charge, he must, according to common sense and common experience, be taken to contract with the railway company for the carriage of himself and his personal luggage only, and that he can no more extend the contract to the conveyance of a single package of merchandise than of his entire worldly possessions." So we say in this case, it was not in the power of appellee to extend the liability of the company on account of his own convenience. There was no undertak-

ing to carry merchandise, and he had no right to impose his goods subtilely upon the company, and then seek to make the obligation that of a common carrier. If he desired to have his merchandise or wares go upon the train with him, it was but just to the carrier he should disclose its nature and value, and if the company then chose to treat it as baggage, the liability of a common carrier would attach, but not otherwise.

The case of the Great Northern Railway Co. *v.* Shepherd, *supra*, is a case where the passenger had a quantity of ivory handles in his baggage. No notice was given, and it was not so packed as to indicate to the carrier it contained merchandise. It was decided the carrier of passengers for hire is, at common law, only bound to carry their personal luggage. Therefore, if a passenger has merchandise among his luggage, or so packed the carrier has no notice it is merchandise, he is not responsible for its loss.

The case of Cahill *v.* L. & N. W. Ry. Co., *supra*, in some of its features is like the case at bar. The plaintiff was a commercial traveller. He had checked, as baggage, a box covered with a black leather case, which had painted across the top, on each end, the word "Glass" in large white letters, and also the name of his employer in like legible letters. It contained valuable merchandise. No information was given by the plaintiff to the company's servants, nor was any inquiry made by them as to the contents of the box. It was held, in an action against the company for the loss of the box, that, inasmuch as it contained merchandise only and no personal luggage, there was no contract to carry it, and consequently it was not liable for the loss.

The case was reargued in the Exchequer Chamber, before a full bench. 13 J. Scott, 818. Cockburn, C. J., agreed with the judges of the Court of Common Pleas, if the company chose to take as ordinary baggage that which it knew to be merchandise, it is not competent, in the event of loss, to claim exemption from liability on the ground the article consists of merchandise. "But," he adds, "on the contrary, if a passenger who knows or ought to know that he is only entitled to have his ordinary personal luggage carried free of charge, choose to carry with him merchandise for which the company is entitled to charge, he cannot claim to be compensated in respect to any loss or injury, by the company to whom he has abstained from giving notice of the contents."

The fact the box was marked "Glass" was not a circumstance, in the opinion of the court, that would charge the company with notice it contained merchandise. It could regard it as an indication it was to be handled with more than ordinary care. This case is a much stronger one than the present plaintiff's case. There was very much more to put the company on inquiry. It was ruled, however, it was not the duty of the company to inquire as to the contents of the luggage, but it was the duty of the plaintiff himself to give

notice, and his failure to do so was sufficient to bar a recovery. To the same effect is the case of The Belfast & Ballymena R. R. Co. *v.* Keys, 9 House of Lords Cases, 556. The case of Dunlap *v.* The International Steamboat Co., 98 Mass. 371, is in entire conformity with the views expressed in the English cases. . . .[1]

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HANNIBAL RAILROAD *v.* SWIFT.

12 Wall. (U. S.) 262. 1870.

Field, J. . . . A considerable portion of the property, it is true, was not personal baggage, which the company was obliged to transport under the contract to carry the person; nor does it appear that it was offered to the company as such. It embraced buffalo robes, hair mattresses, pillows, writing-desks, tables, statuary, and pictures, in relation to which there could be no concealment, and it is not pretended that any was attempted. Where a railroad company receives for transportation, in cars which accompany its passenger trains, property of this character, in relation to which no fraud or concealment is practised or attempted upon its employees, it must be considered to assume, with reference to it, the liability of common carriers of merchandise. It may refuse to receive on the passenger train property other than the baggage of the passenger, for a contract to carry the person only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travellers for their personal use and convenience; such quantity depending, of course, upon the station of the party, the object and length of the journey, and many other considerations. But if property offered with the passenger is not represented to be baggage, and it is not so packed as to assume that appearance, and it is received for transportation on the passenger train, there is no reason why the carrier shall not be held equally responsible for its safe conveyance as if it were placed on the freight train, as undoubtedly he can make the same charge for its carriage.[2]

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[1] *Acc.*: Humphreys *v.* Perry, 148 U. S. 627.

[2] But in Blumantle *v.* Fitchburg R. Co., 127 Mass. 322, a package was received appearing to be merchandise, and the court say: In the case at bar, the plaintiff offered and delivered the bundles as his personal baggage, and requested that they might be checked as such; and the baggage-master gave him checks for them accordingly, as he was bound to do for personal baggage of passengers, by the St. of 1874, c. 372, § 136. There was no evidence that either the plaintiff or the baggage-master agreed or intended that they should be carried as freight, or that the baggage-master had any authority to receive freight on a passenger train, or to bind the corporation to carry merchandise as personal baggage. The case cannot be distinguished in principle from the previous de-

HENDERSON *v.* LOUISVILLE, ETC. R. CO.

123 U. S. 61. 1887.

THIS was an action against a railroad company. Judgment for defendant. Plaintiff sued out this writ of error.

Justice GRAY. This was an action against a railroad corporation by a passenger to recover for the loss of a handbag and its contents.

The plaintiff, a married woman, suing by authority of her husband, alleged in the original petition that on October 25, 1883, the defendant, being a common carrier of goods and persons for hire, received her into one of its cars as a passenger from her summer residence at Pass Christian, in the State of Mississippi, to her winter residence in New Orleans, having in her hand, and in her immediate custody, possession, and control, a leather bag of a kind usually carried by women of her condition and station in society, containing $5800 in bank bills, and jewelry worth $4075; that while the plaintiff, holding the bag in her hand, was attempting to close an open window next her seat, through which the cold wind was blowing upon her, the bag and its contents, by some cause unknown to her, accidentally fell from her hand through the open window upon the railroad; that she immediately told the conductor of the train that the bag contained property of hers of great value, and requested him to stop the train, and to allow her to leave the car and retake the bag and its contents; but he refused to do so, although nothing hindered or prevented him, and, against her protestations, caused the train to proceed at great speed for three miles to Bay St. Louis, where he stopped the train, and she despatched a trusty person to the place where the bag had fallen; but before he arrived there, the bag, with its contents, was stolen and carried away by some person or persons to the plaintiff unknown, "and was wholly lost to the plaintiff by the gross negligence of the defendant as aforesaid."

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The mere statement of the case is sufficient to demonstrate the correctness of the judgment below.

The facts alleged in the original petition constitute no breach or neglect of duty on the part of the defendant towards the plaintiff. She did not intrust her bag to the exclusive custody and care of the defendant's servants, but kept it in her own immediate possession,

cisions of this court, already cited. Evidence tending to show that the baggage-master knew or supposed the bundles to contain merchandise, or that other passengers had similar bundles, would not warrant the jury in finding that the defendant agreed to transport the plaintiff's merchandise, or became liable therefor as a common carrier. The instructions under which the case was submitted to the jury were therefore erroneous.

without informing the defendant of the value of its contents, until after it had dropped from her hand through the open window. Even if no negligence is to be imputed to her in attempting to shut the window with the bag in her hand, yet her dropping the bag was not the act of the defendants or its servants, nor anything that they were bound to foresee or guard against; and after it had happened she had no legal right, for the purpose of relieving her from the consequences of an accident for which they were not responsible, to require them to stop the train, short of a usual station, to the delay and inconvenience of other passengers, and the possible risk of collision with other trains.

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Judgment affirmed.

FIRST NATIONAL BANK *v.* MARIETTA, ETC. R. CO.

20 Ohio St. 259. 1870.

SCOTT, J. . . . . .

Upon well-settled principles the defendant became bound, in consideration of the fare paid by McElroy, to use the highest degree of diligence and care in transporting him to his place of destination. And this contract for the carriage of his person necessarily included the wearing apparel which accompanied his person, such reasonable sum of money as might be in good faith carried with him for the expenses of the journey, together with all such articles, to a reasonable extent, at least, as are ordinarily carried or worn upon the person for purposes of personal use, convenience, or ornament; and we agree with counsel for plaintiff that the contract also included the carriage of "his baggage delivered to the defendant as such to be carried, to the extent of an ordinary and reasonable wardrobe for one in his station in life, together with such articles as are usually found in the paraphernalia of a traveller."

But the notes for the loss of which this action is brought can neither be regarded as a part of the passenger's baggage, nor as money intended to defray the expenses of the journey. The statements of the petition show that the notes were simply being transmitted, for business purposes, from Greenfield to Cincinnati, and were not intended to be used by the passenger for defraying the expenses of his journey or otherwise. The trip may have been undertaken on account of the money, but the money was not carried on account of the trip. Nor was the defendant intrusted with the custody of these notes, or specially charged with any care or oversight in respect to them. They remained in the exclusive custody and control of McElroy. And as they were clearly not included in the contract for the transportation of the passenger and his baggage, and were

not subjected to the custody of the carrier, it is difficult to see how he can be held liable for a want of care over them.

We do not call in question the right of a passenger to carry about his person, for the mere purpose of transportation, large sums of money, or small parcels of great value, without communicating the fact to the carrier, or paying anything for their transportation. But he can only do so at his own risk, in so far as the acts of third persons, or even ordinary negligence on the part of the carrier or his servants is concerned. For this secret method of transportation would be fraud upon the carrier, if he could thereby be subjected to an unlimited liability for the value of parcels never delivered to him for transportation, and of which he has no knowledge, and has therefore no opportunity to demand compensation for the risk incurred. No one could reasonably suppose that a liability which might extend indefinitely in amount would be gratuitously assumed, even though the danger to be apprehended should arise from the inadvertent negligence of the carrier himself.[1]

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LEWIS *v.* NEW YORK SLEEPING CAR CO.

143 Mass. 267. 1887.

Two actions, each with a count in contract and a count in tort, to recover for the loss of the plaintiff's property alleged to have been stolen while the plaintiff was riding as a passenger in the defendant's car, through the negligence of the defendant's servant. . . .

The jury returned a verdict for the plaintiff in each case; and the defendant alleged exceptions.

Morton, C. J. The use of sleeping-cars upon railroads is modern, and there are few adjudicated cases as to the extent of the duties and liabilities of the owners of such cars. They must be ascertained by applying to the new condition of things the comprehensive and elastic principles of the common law. When a person buys the right to the use of a berth in a sleeping-car, it is entirely clear that the ticket which he receives is not intended to, and does not, express all the terms of the contract into which he enters. Such ticket, like the ordinary railroad ticket, is little more than a symbol intended to show to the agents in charge of the car that the possessor has entered into a contract with the company owning the car, by which he is entitled to passage in the car named on the ticket.

Ordinarily, the only communication between the parties is that the passenger buys, and the agent of the car company sells, a ticket

[1] *Acc.:* Weeks *v.* N. Y., N. H., & H. R. R. Co., 72 N. Y. 50.

between two points; but the contract thereby entered into is implied from the nature and usages of the employment of the company.

A sleeping-car company holds itself out to the world as furnishing safe and comfortable cars, and, when it sells a ticket, it impliedly stipulates to do so. It invites passengers to pay for, and make use of, the cars for sleeping, all parties knowing that, during the greater part of the night, the passenger will be asleep, powerless to protect himself or to guard his property. He cannot, like the guest of an inn, by locking the door, guard against danger. He has no right to take any such steps to protect himself in a sleeping-car, but, by the necessity of the case, is dependent upon the owners and officers of the car to guard him and the property he has with him from danger from thieves or otherwise.

The law raises the duty on the part of the car company to afford him this protection. While it is not liable as a common carrier or as an innholder, yet it is its duty to use reasonable care to guard the passengers from theft, and if, through want of such care, the personal effects of a passenger such as he might reasonably carry with him are stolen, the company is liable for it. Such a rule is required by public policy, and by the true interests of both the passenger and the company; and the decided weight of authority supports it. Woodruff Sleeping & Parlor Coach Co. *v.* Diehl, 84 Ind. 474; Pullman Car Co. *v.* Gardner, 3 Penny. 78; Pullman Palace Car Co. *v.* Gaylord, 23 Am. Law Reg. N. S. 788.

The notice by which the defendant company sought to avoid its liability was not known to the plaintiff, and cannot avail the defendant.

The defendant contends that there was no evidence of negligence on its part. The fact that two larcenies were committed in the manner described in the testimony is itself some evidence of the want of proper watchfulness by the porter of the car; add to this the testimony that the porter was found asleep in the early morning, that he was required to be on duty for thirty-six hours continuously, which included two nights, and a case is presented which must be submitted to the jury.

We have considered all the questions which have been argued in the two cases before us, and are of opinion that the rulings at the trial were correct.

Exceptions overruled.[1]

[1] *Contra:* Pullman P. C. Co. *v.* Lowe, 28 Nebr. 239.

CLARK *v.* BURNS.

118 Mass. 275. 1875.

Contract, for the value of a watch, against the owners of a steamship as common carriers, with counts in tort for negligence, and also counts charging them as innkeepers. The case was submitted to the Superior Court on an agreed statement of facts in substance as follows: —

The defendants are the owners of the Cunard line of steamers, so called, which run between Boston and Liverpool, and New York and Liverpool, and are common carriers of passengers and freight between those places. On November 28, 1871, the plaintiff left Liverpool on board the steamship "Calabria," one of the Cunard line, for New York, as a first-class passenger. The plaintiff paid for his ticket, by which he became entitled to the usual accommodation on board the ship for sleeping and lodging, and to be supplied with proper food. He took with him and wore on his person in the daytime the watch referred to in the declaration. He occupied a state-room with two berths, one of which was occupied by another passenger, placed there by the defendants, and it is admitted that the watch was not taken by him. The state-room had a lock, but no key or other fastening. When the plaintiff went to bed on Sunday evening, December 3, at nine o'clock, he put his watch in the pocket made for it in his waistcoat, which he hung by the arm-holes on a hook in his state-room, intended for clothes to be hung on. He did not fasten his state-room door, having no means to do so. The lamp in the state-room was so placed that the steward had to come into the state-room and go to the farther end thereof to light it and to put the light out, and was in the habit of doing so at the time appointed, by the rules and regulations of the ship, for lighting the lamps and putting out the lights. Passengers are not allowed to light or put out the lamps. The lamps are put out at ten o'clock, P.M. When the plaintiff first arose to dress himself at the usual hour on Monday morning, his watch was missing. He notified the captain immediately of his loss, and the purser made a thorough search of the state-room, and then a careful examination of the plaintiff's trunk and the trunk of the gentleman who occupied the other berth in the state-room, but without success.

The plaintiff had the usual accommodations given to first-class passengers on board the defendants' steamers, and it is the usual custom of the defendants not to permit the locking of state-room doors, nor to permit passengers to control the lamps in their state-rooms or the windows thereof, but to give the stewards access at all times to the state-rooms in order that passengers may not, by the

use of matches, or by imprudently opening their windows, incur the risk to themselves, their fellow-passengers, and the ship and cargo, of fire, and of the entrance of water through the windows, and also that they may be accessible in case of accident or danger, or of their own helplessness from sickness or other causes.

When the plaintiff reached Boston he called on the defendants' agent, Mr. Alexander, of whom he purchased his ticket, and requested of him payment for the loss sustained by him, and at the same time complained that the state-rooms were not allowed to be locked, to which Alexander replied, giving as a reason for the rule, that the state-rooms must be accessible for the safety of the ship, cargo, and passengers. The plaintiff had crossed the ocean three times before in boats of the Cunard line and had never had a key or fastening to his state-room, and understood that it was against the rule or custom of these ships. The watch was worth one hundred and twenty-five dollars. The pleadings may be referred to.

If upon the foregoing facts the plaintiff was entitled to recover, judgment was to be rendered for $125, and interest from date of the writ, with costs; otherwise judgment for the defendants, with costs.

Upon the facts agreed, Brigham, C. J., ruled that the plaintiff could not maintain this action, and ordered judgment for the defendants; and the plaintiff alleged exceptions.

Gray, C. J. The liabilities of common carriers and innkeepers, though similar, are distinct. No one is subject to both liabilities at the same time, and with regard to the same property. The liability of an innkeeper extends only to goods put in his charge as keeper of a public-house, and does not attach to a carrier who has no house and is engaged only in the business of transportation. The defendants, as owners of steamboats carrying passengers and goods for hire, were not innkeepers. They would be subject to the liability of common carriers for the baggage of passengers in their custody, and might perhaps be so liable for a watch of the passenger locked up in his trunk with other baggage. But a watch, worn by a passenger on his person by day, and kept by him within reach for use at night, whether retained upon his person, or placed under his pillow, or in a pocket of his clothing hanging near him, is not so intrusted to their custody and control as to make them liable for it as common carriers. Steamboat Crystal Palace *v.* Vanderpool, 16 B. Mon. 302; Tower *v.* Utica Railroad, 7 Hill, 47; Abbott *v.* Bradstreet, 55 Maine, 530; Pullman Palace Car Co. *v.* Smith, 7 Chicago Legal News, 237.

Whether the defendants' regulations as to keeping the doors of the state-rooms unlocked, the want of precautions against theft, and the other facts agreed, were sufficient to show negligence on the part of the defendants, was, taking the most favorable view for the plaintiff, a question of fact, upon which the decision of the court below was conclusive. Fox *v.* Adams Express Co., 116 Mass. 292.

Exceptions overruled.

2. DELIVERY TO CARRIER.

GROSVENOR, Respondent, *v.* NEW YORK CENT. R. CO., Appellant.

39 N. Y. 34. 1868.

The complaint in this action alleges that, in April, 1861, the plaintiff delivered to the defendant, at Clifton Springs, a cutter, to be carried by it to Buffalo, and paid the defendant therefor, which the defendant agreed to do, and that by the negligence of the defendant, it became wholly lost to the plaintiff. The answer denies these allegations. The issue was tried in the Superior Court of Buffalo, before Justice Clinton and a jury, when the following facts were proved: That the plaintiff called upon the defendant's depot agent at Clifton, and paid him the freight on the cutter, and the fare of his servant to Buffalo, and told him that he would send them down in the morning, to go by the afternoon train. The servant brought the cutter, by plaintiff's direction, to have it shipped to Buffalo, and arrived at the depot about six o'clock in the morning, and placed it on the platform of the freight-house, next the railroad track, with one end next the freight-house, and the other toward the track, and went back after the thills; that he returned in about an hour with them and stopped in front of the passenger depot, about six rods from the freight-house, and saw the defendant's baggage-man, Hall, who, at the time, was sweeping out the depot, and said to him, there is some stuff to go to Buffalo. He asked on what train, to which he replied, the one o'clock, and then took the thills and laid them with the cutter. He had not then seen the baggage-man do anything with the freight, and did not ask for or take any receipt for the property; that one, Sutherland, was the defendant's agent there, and had been such agent for three years, and was alone authorized to receive and deliver freight, and resided in the depot. The defendant proved Hall was baggage-man, and had never received freight or given receipts therefor, except by his especial directions, and had no general orders on that subject. That freight is always received and delivered at the east end of the freight-house. That there is a platform alongside of the freight-house, next the track, and comes within a few inches of a freight-car on the track, which is used for receiving and delivering freight from and to the cars, when it is taken into or from the freight-house and weighed; and that it is received from and delivered at the east end of the depot. That the cutter when on the platform, where it was left by plaintiff's servant, could not be seen from the passenger depot. That the cutter, placed on the platform, as stated, would

project over it nine inches. That two or three hours after it was left, a car in a passing train caught the cutter and broke it, and the first knowledge the agent had of its being there, was seeing it pass his office at the passenger depot on this car, broken. That it was the invariable custom for the shipper to mark property and its destination, before the defendant received it, when he weighed it and ascertained the freight; and that the plaintiff's servant did mark a box, which he brought with the cutter in the afternoon, before shipment, and said he wanted it to go to Buffalo.

At the close of the plaintiff's testimony, and at the close of the evidence, the defendant made a motion for a nonsuit, upon the ground, that, upon the undisputed facts, the plaintiff was not entitled to recover, which motion was denied by the court, and an exception taken to the decision by the defendant.

The jury found a verdict for the plaintiff for $78.16, for which judgment with costs was entered. The defendant appealed to the General Term of that court, where the judgment was affirmed. The defendant thereupon appealed to this court.

MILLER, J. I am of the opinion that the court erred in refusing to nonsuit the plaintiff upon the trial. To render a party liable as a common carrier, it must be established that the property was actually delivered to the common carrier or to some person duly authorized to act on his behalf. The responsibility of the carrier does not commence until the delivery is completed. Angell on Carriers, § 129; Story on Bailments, § 532. It is not enough that the property is delivered upon the premises, unless the delivery is accompanied by notice to the proper person. Packard *v.* Getman, 6 Cow. 757; Trevor *v.* U. & S. R. R. Co., 7 Hill, 47; Blanchard *v.* Isaacs, 3 Barb. 388; 2 Kent Com. 604; 1 Pars. on Con. 654. The liability of the carrier attaches only from the time of the acceptance of the goods by him. Story on Bailments, § 533; 6 Cow. *supra*. To complete the delivery of the property within the rules laid down in the authorities, I think it is also essential that the property should be placed in such a position that it may be taken care of by the agent or person having charge of the business, and under his immediate control. It must be accepted and received by the agent. It appears in the case at bar that the cutter of the plaintiff was placed upon the platform of the defendant's freight-house, by a servant of the plaintiff, the freight having been previously paid, to be transported to Buffalo. At the time when it was thus left, a baggageman in the defendant's employment, who was then engaged in sweeping out the depot, was notified that there was some freight to go to Buffalo in the noon train. The servant of the plaintiff testifies that he had seen this person receive and put freight on the cars, and at this time he apparently had charge of the depot, although the proof on the part of the defendant shows that another employee was the real freight agent, and the person with whom the contract was

made for the carriage of the property, and that the baggage-man had no authority to receive it. Upon this state of facts, I am inclined to think that the plaintiff had established sufficient *prima facie* to submit to the jury the question whether the baggage-man was authorized to receive the property, and whether the notice to him was of itself sufficient. Persons dealing with railroad corporations, and parties engaged in the transportation of freight, have a right to consider that those usually employed in the business of receiving and forwarding it, have ample authority to deal with them. It is enough to establish a delivery, in the first instance, to prove that a person thus acting received and accepted the property for the purpose of transportation, and even although it subsequently appears that another employee was actually the agent having charge of this department of business, yet the company who sanction the performance of this duty by other persons in their employment, and thus hold out to the world that they are authorized agents, are not at liberty to relieve themselves from responsibility by repudiating their acts. So far, then, as this branch of the case is concerned, it was at least a question of fact, to be submitted to the jury under proper instructions, whether the baggage-man of the defendant, to whom it is claimed by the plaintiff the cutter was delivered, was the agent of the defendant, duly authorized to receive the same, and whether notice of its delivery was given to him as such agent. But whether he was such agent, or the duty of receiving freight devolved upon another person, the defendant could not be held liable under any circumstances, without an actual and complete delivery of the property into the possession of the corporation, and under its control. This, I think, was not done. The undisputed testimony shows that the cutter was placed upon the platform, and that within two or three hours afterward, it was carried away and broken to pieces by a passing train of cars. The fact that it was thus carried away evinces that it was carelessly exposed by the plaintiff's servant; that the destruction of the cutter was occasioned by his negligence, and that the delivery was not as perfect and complete as it should have been.

The accident would not have happened had the cutter been placed beyond the reach of passing trains. It was not enough that the agent was notified, to make out a valid acceptance and delivery. The place of delivery was important, and it was equally essential that due care should be exercised. Suppose the servant had left the cutter on the track of the railroad, and notified the agent, would the defendant have been responsible? Clearly not, for the apparent reason that there was no delivery upon the premises, no surrender of the property into the possession of the agent. Until it was actually delivered, the agent was under no obligation to take charge of the property, even if notified. It is apparent that the plaintiff was in fault in not delivering the property to the defendant, and in leaving

it in an exposed condition, which caused its destruction; and, having failed to establish this material part of his case, should have been nonsuited. As a new trial must be granted for the error stated, it is not important to examine the other questions raised and discussed.

Judgment reversed, and new trial granted, with costs to abide the event.

GREEN *v.* MILWAUKEE & ST. PAUL R. CO.

38 Ia. 100. 1874.

Action to recover the value of a trunk and contents of clothing alleged to have been lost or destroyed while in possession of defendant as a carrier. There was a trial to a jury, and a verdict rendered against plaintiff under an instruction of the court to the effect that there was no evidence showing that the trunk was delivered to defendant or its agents. From a judgment rendered upon this verdict plaintiff appeals.

Beck, C. J. The evidence discloses the fact that plaintiff, desiring to take passage by an early morning train on defendant's road at Boscobel, in the State of Wisconsin, for Decorah, sent her trunk the evening before by a drayman to defendant's depot. It was left by the drayman in the waiting-room, and as there were no employees of defendant about the premises, no notice thereof was given to any one. This was after business hours in the evening. It was shown that plaintiff had quarterly, for three years, been in the habit of making the same journey she was about to take, and had always sent her trunk the evening before, as she did in this case, and that other travellers were in the habit of doing the same thing when they went by the early train. The drayman testified that he had often left baggage at the depot under similar circumstances, but that his custom was to notify the depot agent or servant of defendant.

Upon this evidence the court directed the jury that there was no proof of the delivery of the trunk to defendant or its servants.

It is not claimed that defendant would be liable without a delivery, either actual or constructive, of the property to its agent or servant. That a delivery may be made at the proper place of receiving such baggage under the express assent or authority of the carrier without notice to its employees will not, we presume, be disputed. It is equally clear upon principle that this assent may be presumed from the course of business or custom of the carrier. Upon evidence of this character contracts based upon business transactions are constantly established. The citation of authority is not required to support this position. See Merriam *v.* Hartford & N. H. R. R. Co., 20 Conn. 354.

The instruction which is the foundation of plaintiff's objection directs the jury that there was no evidence of a delivery of the trunk to the defendant. In this we think there is error. There was evidence tending to show a course of business on the part of defendant, a custom, to receive baggage left at the station-house, as in this case, without notice to plaintiff's servants. Upon evidence of this character, it was proper that the facts should have been left to the determination of the jury, whether there had been a delivery of the property within the rules above announced, — whether a course of business, a custom, had been established, to the effect that a delivery of baggage at the station-house without notice, was regarded by the defendant as a delivery to its servants, and whether plaintiff's trunk was received under this custom. It is a well-settled rule that the courts cannot determine upon the sufficiency of evidence to authorize a verdict where there is a conflict, or some evidence upon the whole case. In such a case an instruction to the effect that there is no evidence, and directing a verdict accordingly, is erroneous. Way *v.* Illinois Cent. R. R. Co., 35 Iowa, 585.

The judgment of the District Court is reversed, and the cause remanded.

Reversed.

MICHIGAN SOUTHERN, ETC. R. CO. *v.* SHURTZ.

7 Mich. 515. 1859.

MARTIN, C. J. The principal question presented by this case, is whether the railroad company are liable as common carriers for the wheat deposited in their warehouse, to await orders for transportation, and a determination of what shall be its destination. We think they are not, nor should they be. By their charter the company have no right to charge as warehousemen for storage of goods awaiting transportation; but this disability does not of itself create any liability. When the goods are delivered to be transported to a specified point, the liability of the company as carriers commences immediately; but if they are deposited to await orders, — if the company cannot carry them because ignorant of the contemplated destination, or because no destination has been concluded upon by the owner, — it would be gross injustice to hold them subject to the extraordinary liabilities of common carriers, while thus awaiting the determination of their owner. While the wheat was lying in their warehouse awaiting the determination of Shurtz as to its destination, the company cannot be regarded as anything more than gratuitous bailees, and are liable only as such. If the intention of Shurtz cannot be clearly seen to have been that it should be transported to

any particular place, how can they be seen to be carriers of it? Can the company be carriers of a thing not to be carried? But when Shurtz had determined to what point he would have his wheat transported, and had notified the company of such determination, then their liability as carriers commenced, and it became their duty to forward it without delay. This is the obligation of their charter, and a want of facilities for transportation will not relieve them from that liability.

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3. DUTY TO SERVE THE PUBLIC.

a. *Without discrimination.*

CHICAGO & N. W. RY. CO. *v.* PEOPLE.

56 Ill. 365. 1870.

Lawrence, C. J. This was an application for a mandamus, on the relation of the owners of the Illinois River elevator, a grain warehouse in the city of Chicago, against the Chicago and Northwestern Railroad Company. The relators seek by the writ to compel the railway company to deliver to said elevator whatever grain in bulk may be consigned to it upon the line of its road. There was a return duly made to the alternative writ, a demurrer to the return, and a judgment *pro forma* upon the demurrer, directing the issuing of a peremptory writ. From that judgment the railway company has prosecuted an appeal.

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Since the 10th of August, 1866, the Chicago and Northwestern Company, in consequence of certain arrangements and agreements on and before that day entered into between the company and the owners of certain elevators known as the "Galena," "Northwestern," "Mann & Scott," "Union," "City," "Munger and Armor," and "Wheeler," has refused to deliver grain in bulk to any elevator except those above named. There is also in force a rule of the company, adopted in 1864, forbidding the carriage of grain in bulk if consigned to any particular elevator in Chicago, thus reserving to itself the selection of the warehouse to which the grain should be delivered. The rule also provides that grain in bags shall be charged an additional price for transportation. This rule is still in force.

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In the oral argument of this case it was claimed, by counsel for the respondent, that a railway company was a mere private corpora-

tion, and that it was the right and duty of its directors to conduct its business merely with reference to the pecuniary interests of the stockholders. The printed arguments do not go to this extent, in terms, but they are colored throughout by the same idea, and in one of them we find counsel applying to the Supreme Court of the United States, and the Supreme Court of Pennsylvania, language of severe, and almost contemptuous, disparagement, because those tribunals have said that "a common carrier is in the exercise of a sort of public office." N. J. Steam Nav. Co. *v.* Merch. Bank, 6 How. 381; Sanford *v.* Railroad Co., 24 Penn. 380. If the language is not critically accurate, perhaps we can pardon these courts, when we find that substantially the same language was used by Lord Holt, in Coggs *v.* Bernard, 2 Lord Raymond, 909, the leading case in all our books on the subject of bailments. The language of that case is, that the common carrier "exercises a public employment."

We shall engage in no discussion in regard to names. It is immaterial whether or not these corporations can be properly said to be in the exercise of "a sort of public office," or whether they are to be styled private or quasi-public corporations. Certain it is, that they owe some important duties to the public, and it only concerns us now to ascertain the extent of these duties as regards the case made upon this record.

It is admitted by respondent's counsel that railway companies are common carriers, though even that admission is somewhat grudgingly made. Regarded merely as a common carrier at common law, and independently of any obligations imposed by the acceptance of its charter, it would owe important duties to the public, from which it could not release itself, except with the consent of every person who might call upon it to perform them. Among these duties, as well defined and settled as anything in the law, was the obligation to receive and carry goods for all persons alike, without injurious discrimination as to terms, and to deliver them in safety to the consignee, unless prevented by the act of God or the public enemy. These obligations grew out of the relation voluntarily assumed by the carrier toward the public, and the requirements of public policy, and so important have they been deemed that eminent judges have often expressed their regret that common carriers have ever been permitted to vary their common-law liability, even by a special contract with the owner of the goods.

Regarded, then, merely as a common carrier at common law, the respondent should not be permitted to say it will deliver goods at the warehouses of A. and B., but will not deliver at the warehouse of C., the latter presenting equal facilities for the discharge of freight, and being accessible on respondent's line.

But railway companies may well be regarded as under a higher obligation, if that were possible, than that imposed by the common law, to discharge their duties to the public as common carriers fairly

and impartially. As has been said by other courts, the State has endowed them with something of its own sovereignty, in giving them the right of eminent domain. By virtue of this power, they take the lands of the citizen against his will and can, if need be, demolish his house. Is it supposed these great powers were granted merely for the private gain of the corporators? On the contrary, we all know the companies were created for the public good.

The object of the legislature was to add to the means of travel and commerce. If, then, a common carrier at common law came under obligations to the public from which he could not discharge himself at his own volition, still less should a railway company be permitted to do so, when it was created for the public benefit and has received from the public such extraordinary privileges. Railway charters not only give a perpetual existence and great power, but they have been constantly recognized by the courts of this country as contracts between the companies and the State, imposing reciprocal obligations.

The courts have always been, and we trust always will be, ready to protect these companies in their chartered rights, but, on the other hand, we should be equally ready to insist that they perform faithfully to the public those duties which were the object of their chartered powers.

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The contract in question is peculiarly objectionable in its character and peculiarly defiant of the obligations of the respondent to the public as a common carrier. If the principle implied in it were conceded, the railway companies of the State might make similar contracts with individuals at every important point upon their lines, and in regard to other articles of commerce besides grain, and thus subject the business of the State almost wholly to their control, as a means of their own emolument. Instead of making a contract with several elevators, as in the present case, each road that enters Chicago might contract with one alone and thus give to the owner of such elevator an absolute and complete monopoly in the handling of all the grain that might be transported over such road. So, too, at every important town in the interior, each road might contract that all the lumber carried by it should be consigned to a particular yard. How injurious to the public would be the creation of such a system of organized monopolies in the most important articles of commerce, claiming existence under a perpetual charter from the State, and, by the sacredness of such charter, claiming also to set the legislative will itself at defiance, it is hardly worth while to speculate. It would be difficult to exaggerate the evil of which such a system would be the cause, when fully developed and managed by unscrupulous hands.

Can it be seriously doubted whether a contract, involving such a principle, and such results, is in conflict with the duties which the

company owes to the public as a common carrier? The fact that a contract has been made is really of no moment, because, if the company can bind the public by a contract of this sort, it can do the same thing by a mere regulation of its own, and say to these relators that it will not deliver at their warehouse the grain consigned to them, because it prefers to deliver it elsewhere. The contract, if vicious in itself, so far from excusing the road, only shows that the policy of delivering grain exclusively, at its chosen warehouses, is a deliberate policy, to be followed for a term of years, during which these contracts run.

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The principle that a railroad company can make no injurious or arbitrary discrimination between individuals in its dealings with the public, not only commends itself to our reason and sense of justice, but is sustained by adjudged cases. In England, a contract which admitted to the door of a station, within the yard of a railway company, a certain omnibus, and excluded another omnibus, was held void. Marriot *v.* L. & S. W. R. R. Co., 87 Eng. Com. Law, 498.

In Gaston *v.* Bristol & Exeter Railroad Company, 95 Eng. Com. Law, 641, it was held that a contract with certain ironmongers, to carry their freight for a less price than that charged the public, was illegal, no good reason for the discrimination being shown.

In Crouch *v.* The L. & N. W. R. Co., 78 Eng. Com. Law, 254, it was held, a railway company could not make a regulation for the conveyance of goods which, in practice, affected one individual only.

In Sandford *v.* Railroad Company, 24 Penn. 382, the court held, that the power given in the charter of a railway company to regulate the transportation of the road did not give the right to grant exclusive privileges to a particular express company. The court say, "If the company possessed this power, it might build up one set of men and destroy others; advance one kind of business and break down another, and make even religion and politics the tests in the distribution of its favors. The rights of the people are not subject to any such corporate control."

We refer also to Rogers' Locomotive Works *v.* Erie R. R. Co., 5 Green, 380, and State *v.* Hartford & N. H. R. Co., 29 Conn. 538.

It is insisted by counsel for the respondent that, even if the relators have just cause of complaint, they cannot resort to the writ of mandamus. We are of opinion, however, that they can have an adequate remedy in no other way, and that the writ will therefore lie.

The judgment of the court below awarding a peremptory mandamus must be reversed, because it applies to the Galena division of respondent's road, as well as to the Wisconsin and Milwaukee divisions. If it had applied only to the latter, we should have affirmed the judgment. The parties have stipulated that, in case of reversal, the case shall be remanded, with leave to the relators to

traverse the return. We therefore make no final order, but remand the case, with leave to both parties to amend their pleadings, if desired, in view of what has been said in this opinion.

Judgment reversed.

AYRES *v.* CHICAGO & N. W. RY. CO., APPELLANT.

71 Wis. 372. 1888.

APPEAL from the Circuit Court for Sauk County.

This case was here on a question of pleading upon a former appeal, 58 Wis. 537. The amended complaint is to the effect that the defendant, being a common carrier engaged in the transportation of live-stock, and accustomed to furnish cars for all live-stock offered, was notified by the plaintiffs, on or about October 13, 1882, to have four such cars for the transportation of cattle, hogs, and sheep at its station La Valle, and three at its station Reedsburg, ready for loading on Tuesday morning, October 17, 1882, for transportation to Chicago; that the defendant neglected and refused to provide such cars at either of said stations for four days, notwithstanding it was able and might reasonably have done so; and also neglected and refused to carry said stock to Chicago with reasonable diligence, so that they arrived there four days later than they otherwise would have done; whereby the plaintiffs suffered loss and damage, by decrease in price and otherwise, $1700.

The answer, in effect, admitted the defendant's incorporation with the privileges alleged: "that it was at times engaged in the transportation over its roads of live-stock when and if it was able to do so, and was accustomed to furnish suitable cars therefor upon reasonable notice when within its power to do so: and to receive, transport, and deliver such live-stock with reasonable despatch, but only upon special contracts at the time entered into between the shipper and this defendant, and upon such terms and conditions as should be agreed upon in writing; that one of the lines of this defendant's railway is located as in said amended complaint stated." The answer also, in effect, alleged that "within a reasonable time, and as soon as it reasonably could, and as soon as it was within its power to do so," after the application of the plaintiffs for such cars, the defendant "forwarded four suitable and empty cars to La Valle," and "three suitable and empty cars to Reedsburg," which cars were severally forwarded with reasonable despatch, and arrived in due course and as soon as they could with reasonable despatch be forwarded over its line; that at the times of such respective shipments the plaintiffs entered into an agreement in writing with the defendant for the transportation of said stock at special rates, and in con-

sideration thereof it was agreed that the defendant should not be liable for loss from the delay of trains not caused by the defendant's negligence.

At the close of the trial the jury returned a special verdict to the effect, (1) at the times named the plaintiffs were copartners at Reedsburg, engaged in buying and shipping live-stock to the Chicago market for sale; (2) that at the times stated the defendant was a common carrier, and as such engaged in the transportation of live-stock, and accustomed to furnish cars for and transport all live-stock offered for that purpose; (3) that one of its lines ran from La Valle and Reedsburg to Chicago; (4) that October 13, 1882, the plaintiffs, being fully apprised of the state of the Chicago market for live-stock and prices, proceeded to buy therefor seven car-loads of cattle, hogs, and sheep, four to be loaded at La Valle and three at Reedsburg; (5, 6, 7, 8, 9, 10, 14) that the plaintiffs notified the defendant's agents at the respective stations, October 13, 1882, to have such cars in readiness at said stations respectively, October 17, 1882, and that such notices were reasonable, and such agents promised to order the cars and have them in readiness at the time; (11) that two cars were furnished at Reedsburg, October 17, 1882, and one October 19, 1882; (12) that the four were furnished at La Valle, October 19, 1882; (13) that the defendant furnished two as soon as it reasonably could, but five it did not; (15) that the plaintiffs received no notice before October 17, 1882, that the cars would not be furnished as ordered; (16, 17, 18) that prior to that time, and with the expectation that the cars would be on hand as ordered, the plaintiffs had bought sufficient stock to load said several cars, and had the same at said respective stations on the morning of October 17, 1882; (19) that the defendant, being able to furnish such cars, disregarded its duty as a common carrier of live-stock in not having the same on hand when ordered; (20) that had the cars been so furnished, they would have arrived at Chicago on the morning of October 18, 1882; (21) as it was, two arrived there on Thursday, October 19, 1882, A.M., and five on Friday, October 20, 1882, at 5.45 P.M.; (22, 23, 24) that the market value of hogs in Chicago, on Friday, October 20, was $7.36 per hundred, on Saturday, October 21, was $7.11, and on Monday, October 23, $6.81; (25, 26, 27) that the loss on the hogs, by reason of depreciation of the market, was $140.08; that the total damages of the plaintiffs on all the stock were $825.97, made up of the following items, to wit: Taking care of and feeding stock, $50; shrinkage on hogs, cattle, and sheep, $408.35; depreciation in value on hogs and sheep, $172.58; and interest on the above sums until the rendition of the verdict, $195.04.

The defendant thereupon moved for judgment in its favor upon the verdict and record, which was denied. Thereupon the defendant moved to set aside the verdict, and for a new trial, upon the grounds that the verdict is against the weight of the evidence, and for errors

of the court in its charge to the jury and in its rulings on the trial, and because the damages were excessive and contrary to the proofs, which motion was denied. Thereupon, and upon the motion of the plaintiffs, judgment was ordered in their favor on the special verdict for $825.97 damages and costs. From the judgment entered thereon accordingly the defendant appeals.

Cassoday, J. There is no finding of any agreement on the part of the defendant to have the cars in readiness at the stations on Tuesday morning, October 17, 1882. There is no testimony to support such a finding. One of the plaintiffs testified, in effect, that he told the agent that he would want the cars on the morning of the day named; that the agent took down the order, put it on his book, and said, "All right," he would try and get them, but that they were short because they were then using more cars for other purposes; that nothing more was said. It appears in the case that the cars were in fact furnished. It also appears that, as the shipments were made, special written contracts therefor were entered into between the parties, whereby it was, in effect, agreed and understood that the plaintiffs should load, feed, water, and take care of such stock at their own expense and risk, and that they would assume all risk of injury or damage that the animals might do to themselves or each other, or which might arise by delay of trains; that the defendants should not be liable for loss by jumping from the cars or delay of trains not caused by the defendant's negligence. The court, in effect, charged the jury that there was no evidence of any negligence on the part of the defendant causing delay in any train after shipment, and hence that the delay of the two cars admitted to have been furnished in time was not before them for consideration. This relieves the case from all liability on contract. It also narrows the case to the defendant's liability for the delay of two days in furnishing the five cars at the stations named, as ordered by the plaintiffs, and in the absence of any contract to do so.

In Richardson *v.* C. & N. W. R. Co., 61 Wis. 601, 18 Am. & Eng. R. Cas. 530, it was, in effect, held competent for a railroad company engaged in the business of transporting live-stock to exempt itself by express contract "from damage caused wholly or perhaps in part by the instincts, habits, propensities, wants, necessities, vices, or locomotion of such animals." And it was then said: "Since the action is not based upon contract, the plaintiff must recover, if at all, by reason of the defendant's liability as a common carrier upon mere notice to furnish cars and a readiness to ship at the time notified. Did such notice and readiness to ship create such liability? We have seen that a carrier of live-stock may, to at least a certain extent, limit its liability. Whether the defendant was accustomed to so limit its liability, or to carry all live-stock tendered upon notice, without restriction, does not appear from the record. If it was accustomed to so limit, and the limitation was legal, it should

at least have been so alleged, together with an offer to comply with the customary restriction. If it was accustomed to carry all live-stock offered upon notice and tender, and without restriction, then it would be difficult to see upon what ground it could discriminate against the plaintiff by refusing to do for him what it was constantly in the habit of doing for others."

In that case there was a failure to allege any such custom or holding out on the part of the defendant, or that reasonable notice had been given to the defendant to furnish suitable cars to the person applying therefor, or that the same was within its power to do so; and hence the demurrer was sustained. The allegations thus wanting in that case are present in this complaint. It is, moreover, in effect admitted that the defendant was at times, when able to do so, engaged in the transportation of live-stock over its roads, one line of which runs through the stations in question; that it was accustomed to furnish suitable cars therefor, upon reasonable notice, when within its power to do so; and to receive, transport, and deliver such live-stock with reasonable despatch, but only upon special contracts at the time entered into between the shipper and the defendant, and upon such terms and conditions as should be agreed upon in writing. It is, moreover, manifest that the defendant actually undertook to furnish the cars at the time designated by the plaintiffs; that it succeeded in furnishing two of them on time; that there was a delay of two days in furnishing the other five; and that the plaintiffs were willing to, and did, submit to the terms and conditions of carriage imposed by the defendant by signing the special written contracts mentioned. It must be assumed, also, that such special written contracts were substantially the same as all contracts made by the defendant at that season of the year for the shipment of similar live-stock under similar circumstances. Otherwise the defendant would be justly chargeable with unlawful discrimination; the right to do which the learned counsel for the defendant frankly disclaimed upon the argument.

We are therefore forced to the conclusion that at the time the plaintiffs applied for the cars the defendant was engaged in the business of transporting live-stock over its roads, including the line in question, and that it was accustomed to furnish suitable cars therefor, upon reasonable notice, whenever it was within its power to do so; and that it held itself out to the public generally as such carrier for hire upon such terms and conditions as were prescribed in the written contracts mentioned. These things, in our judgment, made the defendant a common carrier of live-stock, with such restrictions and limitations of its common-law duties and liabilities as arose from the instincts, habits, propensities, wants, necessities, vices, or locomotion of such animals, under the contracts of carriage. This proposition is fairly deducible from what was said in Richardson *v.* C. & N. W. R. Co., *supra*, and is supported by the logic of

numerous cases. North Penn. R. Co. *v.* Commercial Bank, 123 U. S. 727; Moulton *v.* St. P., M. & M. R. Co., 31 Minn. 85, 12 Am. & Eng. R. Cas. 13; Lindsley *v.* C. M. & St. P. R. Co., 36 Minn. 539; Evans *v.* F. R. Co., 111 Mass. 142; Kimball *v.* R. & B. R. Co., 26 Vt. 247, 62 Am. Dec. 567; Rixford *v.* Smith, 52 N. H. 355; Clark *v.* R. & S. R. Co., 14 N. Y. 570, 67 Am. Dec. 205; South & N. A. R. Co. *v.* Henlein, 52 Ala. 606; Baker *v.* L. & N. R. Co., 10 Lea, 304, 16 Am. & Eng. R. Cas. 149; Philadelphia, W. & B. R. Co. *v.* Lehman, 56 Md. 209; McFadden *v.* M. P. R. Co., 92 Mo. 343; 3 Am. & Eng. Cyclop. Law, pp. 1–10, and cases there cited. This is in harmony with the statement of Parke, B., in the case cited by counsel for the defendant, that "at common law a carrier is not bound to carry for every person tendering goods of *any* description, *but his obligation is to carry according to his public profession.*" Johnson *v.* Midland R. Co., 4 Exch. 372. Being a common carrier of live-stock for hire, with the restrictions and limitations named, and holding itself out to the public as such, the defendant is bound to furnish suitable cars for such stock, upon reasonable notice, whenever it can do so with reasonable diligence without jeopardizing its other business as such common carrier. Texas & P. R. Co. *v.* Nicholson, 61 Tex. 491; Chicago & A. R. Co. *v.* Erickson, 91 Ill. 613; Ballentine *v.* N. M. R. Co., 40 Mo. 491; Guinn *v.* W., St. L. & P. R. Co., 20 Mo. App. 453.

Whether the defendant could with such diligence so furnish upon the notice given, was necessarily a question of fact to be determined. The plaintiffs, as such shippers, had the right to command the defendant to furnish such cars. But they had no right to insist upon or expect compliance, except upon giving reasonable notice of the time when they would be required. To be reasonable, such notice must have been sufficient to enable the defendant, with reasonable diligence under the circumstances then existing, to furnish the cars without interfering with previous orders from other shippers at the same station, or jeopardizing its business on other portions of its road. It must be remembered that the defendant has many lines of railroad scattered through different States. Along each and all of these different lines it has stations of more or less importance. The company owes the same duty to shippers at any one station as it does to the shippers at any other station of the same business importance.

The rights of all shippers applying for such cars under the same circumstances are necessarily equal. No one station, much less any one shipper, has the right to command the entire resources of the company to the exclusion or prejudice of other stations and other shippers. Most of such suitable cars must necessarily be scattered along and upon such different lines of railroad, loaded or unloaded. Many will necessarily be at the larger centres of trade. The conditions of the market are not always the same, but are liable to

fluctuations, and may be such as to create a great demand for such cars upon one or more of such lines, and very little upon others. Such cars should be distributed along the different lines of road, and the several stations on each, as near as may be in proportion to the ordinary business requirements at the time, in order that shipments may be made with reasonable celerity. The requirement of such fair and general distribution and uniform vigilance is not only mutually beneficial to producers, shippers, carriers, and purchasers, but of business and trade generally. It is the extent of such business ordinarily done on a particular line, or at a particular station, which properly measures the carrier's obligation to furnish such transportation. But it is not the duty of such carrier to discriminate in favor of the business of one station to the prejudice and injury of the business of another station of the same importance. These views are in harmony with the adjudications last cited.

The important question is whether the burden was upon the plaintiffs to prove that the defendant might, with such reasonable diligence and without thus jeopardizing its other business, have furnished such cars at the time ordered and upon the notice given; or whether such burden was upon the defendant to prove its inability to do so. We find no direct adjudication upon the question. Ordinarily, a plaintiff alleging a fact has the burden of proving it. This rule has been applied by this court, even where the complaint alleges a negative, if it is susceptible of proof by the plaintiff. Helper *v.* State, 58 Wis. 46. But it has been held otherwise where the only proof is peculiarly within the control of the defendant. Mecklem *v.* Blake, 16 Wis. 102; Beckmann *v.* Henn, 17 Wis. 412; Noonan *v.* Ilsley, 21 Wis. 144; Great Western R. Co. *v.* Bacon, 30 Ill. 352; Brown *v.* Brown, 30 La. Ann. 511. Here it may have been possible for the plaintiffs to have proved that there were at the times and stations named, or in the vicinity, empty cars, or cars which had reached their destination and might have been emptied with reasonable diligence, but they could not know or prove, except by agents of the defendant, that any of such cars were not subject to prior orders or superior obligations. The ability of the defendant to so furnish with ordinary diligence upon the notice given, upon the principles stated, was, as we think, peculiarly within the knowledge of the defendant and its agents, and hence the burden was upon it to prove its inability to do so. Where a shipper applies to the proper agency of a railroad company engaged in the business of such common carrier of live-stock for such cars to be furnished at a time and station named, it becomes the duty of the company to inform the shipper within a reasonable time, if practicable, whether it is unable to so furnish, and if it fails to give such notice, and has induced the shipper to believe that the cars will be in readiness at the time and place named, and the shipper, relying upon such conduct of the carrier, is present with his live-stock at the time and

place named, and finds no cars, there would seem to be no good reason why the company should not respond in damages. Of course, these observations do not involve the question whether a railroad company may not refrain from engaging in such business as a common carrier; nor whether, having so engaged, it may not discontinue the same.

The court very properly charged the jury, in effect, that if all the cars had been furnished on time, as the two were, it was reasonable to presume, in the absence of any proof of actionable negligence on the part of the defendant, that they would have reached Chicago at the same time the two did, — to wit, Thursday, October 19, 1882, A.M., — whereas they did not arrive until Friday evening. This was in time, however, for the market in Chicago on Saturday, October 21, 1882. This necessarily limited the recovery to the expense of keeping, the shrinkage, and depreciation in value from Thursday until Saturday. Chicago & A. R. Co. *v.* Erickson, 91 Ill. 613. The trial court, however, refused to so limit the recovery, but left the jury at liberty to include such damages down to Monday, October 23, 1882. For this manifest error, and because there seems to have been a mistrial in some other respects, the judgment of the Circuit Court is reversed and the cause is remanded for a new trial.

SARGENT *v.* BOSTON & LOWELL RAILROAD CORPORATION.

115 Mass. 416. 1874.

Tort against the Boston & Lowell Railroad Corporation, and the Nashua & Lowell Railroad Corporation.

Wells, J. This action is founded upon the supposed obligation of the defendants, as common carriers, to provide facilities and accommodations to enable the plaintiff to transact his business as expressman over and upon the railroads of the defendants. For this purpose he requires that his merchandise and parcels shall be transported, not as freight under the general charge and control of the managers and servants of the railroads, but in their passenger trains and under the exclusive control and supervision of the plaintiff and his agents; who also require special accommodations and facilities in the cars and stations of the defendants, for the receipt and distribution of their packages. It is not alleged that there is any contract for such services. The contract which once existed, and the course of business in previous years, are recited for the purpose of showing the manner in which the business of the plaintiff had grown up and the good-will connected therewith had been gained, as bearing upon

the damages caused by withdrawing from him the means for its further prosecution. The complaint is, that under the guise of a proposal to sell or let the privilege which the plaintiff and his associates had before enjoyed, to be used exclusively by the one party who would pay most for it, the defendants had in fact denied it to all, and assumed the conduct of the business of express carriage and parcel delivery by its own agents and servants.

The allegation of the second count, that the defendant had refused to receive and transport articles of freight for the plaintiff in the usual modes of transportation of freight, is abandoned.

We know no principle or rule of law which imposes upon a railroad corporation the obligation to perform service in the transportation of freight, otherwise than a carrier of goods for the owner in accordance with their consignment; or which forbids it from establishing uniform regulations applicable alike to all persons composing the public to whom the service is due. We are pointed to no provision in the charters of these defendants, or in the general laws relating to railroads, which subjects the use of their roads to the convenience or requirements of other carriers than the corporations authorized to construct and operate them, and such other railroads as may have been authorized to enter upon or unite with and use them. Gen. Sts. c. 63, § 117.

All the provisions of law for the regulation of railroads contemplate the unlimited exercise by the corporation of the rights and duties of general carriers of goods and passengers; and this involves the right to adopt any and all reasonable rules and regulations to direct the mode in which their business shall be transacted. They cannot be required to convert their passenger trains to the purposes of freight at the discretion of parties not responsible for the management of the trains; nor can they be compelled to admit others than their own agents and servants upon their trains or to their stations for the custody, care, receipt, and delivery of freight or parcels.

Whether the defendants, in establishing and conducting the business of their own "parcel department," undertake to collect and distribute goods and parcels in a manner which involves acts *ultra vires*, does not affect the question; nor, if they do so, does it afford the plaintiff any ground of action. His claim is for their refusal to furnish to him certain claimed facilities upon the roads. That refusal does not involve any acts or exercise of powers *ultra vires*.

Nor does the fact that for many years the defendants did afford certain facilities to separate and independent carriers, as express companies, confer any right upon them or impose any obligation, either of contract or duty, upon the defendants to continue the same unchanged.

Whatever may have been contemplated, when the charters for these roads were granted, as to the parties by whom and the mode in which the tracks would be used for the running of trains or car-

ringes upon them, and the manner in which tolls would be received, it cannot be doubted that since the St. of 1845, c. 191, the direction of the use of the roads, and the control of all carriages upon them, are exclusively in the directors of the corporations owning them. It is a franchise of a public nature, it is true: and the directors are bound to conduct its exercise with a view to public convenience. But they, and not the individual members of the public, are intrusted with the discretion, authority, and duty, in the first instance, to determine what the public convenience requires. They are subject, in this respect, to the oversight and regulation of the legislature. It is only when they disregard such regulations as are provided by law, or required by a reasonable consideration of the public convenience and purposes of their charter, that individuals are entitled to complain.

The plaintiff's counsel argues that it is unreasonable, and a violation of the legal obligations of the defendants, to make any discrimination between individuals; or to refuse to the plaintiff privileges which they grant to any other party; and therefore that the arrangement of the defendants with another express company, by which the plaintiff was excluded from similar facilities, was a violation of his legal rights. Such does not appear to be the rule of the common law as held in Massachusetts. Fitchburg Railroad *v.* Gage, 12 Gray, 393. If such a rule has been established by the St. of 1867, c. 339, the plaintiff's case is not maintained upon that ground; 1st, because the contracts with other parties complained of were made before the statute, to wit, in December, 1865, for one year from January 1, 1866, and renewed only for one year from January 1, 1867, — and although the report finds that during the time from January 1, 1866, to the date of the writ November 15, 1871, the plaintiff "has repeatedly demanded to be allowed to carry on his express business over said roads as formerly," it does not appear that any such demand was made after that statute took effect and before the arrangement with those other parties expired. 2d, because the declaration does not charge any such wrong. The allegation is that the parties with whom the supposed contracts were made "were and are only the paid agents of said defendant corporations, and not the proprietors of said express privileges, and that they have continued as such, and such only, to the date of this writ; and that the profits accruing from said fraudulent arrangement are the property of said defendant corporations." The whole scope and drift of the declaration is to charge the defendants with "conspiring and illegally contriving," by means of pretended contracts with other parties, to deprive the plaintiff of the profits of his express business in order to operate the same to their own use. The gravamen of his complaint then is not that the defendants have refused to give him "equal terms, facilities, and accommodations" with other persons and companies, but simply that they have refused to give him such

facilities as he requires, for his special business as carrier, over their roads. His claim must stand upon the right to demand such facilities independently of any enjoyment of like facilities by others. As an absolute right this cannot be maintained.

The plaintiff contends that the "parcel department" which the defendants have established, to the exclusion of the plaintiff and others desiring to make like arrangements, is in contravention of the equality required by the statute, as much as if it were conducted in the interest of a third party. But we think the statute was intended to apply to the dealings of the railroad corporation with the public, and not to the mode in which it should arrange and conduct the different branches of its business as carrier. All the plaintiff can demand is that, in each of those branches, he shall have equal terms with other persons and companies.

The report finds that when the plaintiff demanded to be allowed to carry on his express business over said roads as formerly, "there was sufficient accommodation in the defendants' baggage cars for the plaintiff as well as other occupants of said cars." But there was no refusal to carry the plaintiff and his freight upon the same terms and in the same manner as the defendants performed like services for other persons and companies. It was a refusal only to permit the plaintiff to occupy a portion of the space in the cars and stations in the same manner and for the same purposes as the defendants themselves used and occupied them, paying therefor, and for the required transportation, some special rate which could not well be adjusted otherwise than by special agreement.

The plaintiff fails to make out a legal cause of action, and the

Judgment must be for the defendants.[1]

ATCHISON, TOPEKA & SANTE FÉ R. CO. *v.* DENVER & NEW ORLEANS R. CO.

110 U. S. 667. 1884

This was a bill in equity filed by the Denver & New Orleans Railroad Co., a Colorado corporation owning and operating a railroad in that State, between Denver and Pueblo, a distance of about one hundred and twenty-five miles, against the Atchison and Topeka & Santa Fé Railroad Company, a Kansas corporation, owning and operating a railroad in that State from the Missouri River, at Kansas City, westerly to the Colorado State line, and also operating from there, under a lease, a road in Colorado from the State line to Pueblo, built by the Pueblo & Arkansas Valley Railroad Company,

[1] *Acc.:* Express Cases, 117 U. S. 1. *Contra:* New England Exp. Co. *v.* Maine Cent. R. Co., 57 Me. 188; McDuffee *v.* Portland, &c. R., 52 N. H. 430.

—a Colorado corporation. The two roads so operated by the Atchison, Topeka & Santa Fé Company formed a continuous line of communication from Kansas City to Pueblo, about six hundred and thirty-four miles. The general purpose of the suit was to compel the Atchison, Topeka & Santa Fé Company to unite with the Denver & New Orleans Company in forming a through line of railroad transportation to and from Denver over the Denver & New Orleans road with all the privileges as to exchange of business, division of rates, sale of tickets, issue of bills of lading, checking of baggage and interchange of cars, that were or might be customary with connecting roads, or that were or might be granted to the Denver & Rio Grande Railroad Company, another Colorado corporation, also owning and operating a road parallel to that of the Denver & New Orleans Company between Denver and Pueblo, or to any other railroad company competing with the Denver & New Orleans for Denver business.

[In 1879 the Atchison, Topeka & Santa Fé Company made an arrangement with the Denver & Rio Grande Company for connections between Pueblo and Denver, with division of rates as to joint business.]

In 1882 the Denver & New Orleans Company completed its road between Denver and Pueblo, and connected its track with that of the Atchison, Topeka & Santa Fé, in Pueblo, twelve or fifteen hundred feet easterly from the junction of the Denver & Rio Grande and about three-quarters of a mile from the union depot, at which the Atchison, Topeka & Santa Fé and the Denver & Rio Grande interchange their business, and where each stopped its trains regularly to take on and let off passengers and receive and deliver freight. The Denver & New Orleans Company erected at its junction with the Atchison, Topeka & Santa Fé platforms and other accommodations for the interchange of business, and before this suit was begun the general superintendent of the Denver & New Orleans Company made a request in writing of the general manager of the Atchison, Topeka & Santa Fé [that through bills of lading be given over the two roads, and that the Atchison, Topeka & Santa Fé road deliver cars to the Denver & New Orleans road at the junction of the two roads; also that tickets be placed on sale over the two roads, and a system of through checking of baggage be adopted in the method usual between roads having a joint running arrangement].

This request was refused, and the Atchison, Topeka & Santa Fé Company continued its through business with the Denver & Rio Grande as before, but declined to receive or deliver freight or passengers at the junction of the Denver & New Orleans road, or to give or take through bills of lading, or to sell or receive through tickets, or to check baggage over that line. All passengers or freight coming from or destined for that line were taken or delivered at the regular depot of the Atchison, Topeka & Santa Fé Company in Pueblo,

and the prices charged were according to the regular rates to and from that point, which were more than the Atchison, Topeka & Santa Fé received on a division of through rates to and from Denver under its arrangement with the Denver & Rio Grande Company.

Mr. Chief Justice WAITE. . . . . .

At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond, he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purpose of the contract, and if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may, nevertheless, confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position, by extending his route with the help of others, than he would occupy if the means of transportation employed were all his own. He certainly may select his own agencies and his own associates for doing his own work.

The Atchison, Topeka & Santa Fé Company, as the lessee of the Pueblo & Arkansas Valley Railroad, has the statutory right to establish its own stations and to regulate the time and manner in which it will carry persons and property and the price to be paid therefor. As to all these matters, it is undoubtedly subject to the power of legislative regulation, but in the absence of regulation it owes only such duties to the public, or to individuals, associations, or corporations, as the common law, or some custom having the force of law, has established for the government of those in its condition. As has already been shown, the Constitution of Colorado gave to every railroad company in the State the right to a mechanical union of its road with that of any other company in the State, but no more. The legislature has not seen fit to extend this right, as it undoubtedly may, and consequently the Denver & New Orleans Company comes to the Atchison, Topeka & Santa Fé Company just as any other customer does, and with no more rights. It has established its junction and provided itself with the means of transacting its business at that place, but, as yet, it has no legislative authority to compel the other company to adopt that station or to establish an agency to do business there. So far as statutory regulations are concerned, if it wishes to use the Atchison, Topeka & Santa Fé road for business, it must go to the place where that company takes on and lets off passengers or property for others. It has as a railroad company no statutory or constitutional privileges in this particular over other persons, associations, or corporations. It saw fit to establish its junction at a place away from the station which the Atchison, Topeka & Santa Fé Company had, in the exercise of its legal discretion, located for its own convenience and that of the public. It does not now ask to enter that station with its track or to interchange business at that place, but to compel the Atchison,

Topeka & Santa Fé Company to stop at its station and transact a connecting business there. No statute requires that connected roads shall adopt joint stations, or that one railroad company shall stop at or make use of the station of another. Each company in the State has a legal right to locate its own stations, and, so far as statutory regulations are concerned, it is not required to use any other.

A railroad company is prohibited, both by the common law and by the Constitution of Colorado, from discriminating unreasonably in favor of or against another company seeking to do business on its road; but that does not necessarily imply that it must stop at the junction of one and interchange business there, because it has established joint depot accommodations, and provided facilities for doing a connecting business with another company at another place. A station may be established for the special accommodation of a particular customer; but we have never heard it claimed that every other customer could, by a suit in equity, in the absence of a statutory or contract right, compel the company to establish a like station for his special accommodation at some other place. Such matters are, and always have been, proper subjects for legislative consideration, unless prevented by some charter contract; but, as a general rule, remedies for injustice of that kind can only be obtained from the legislature. A court of chancery is not any more than is a court of law, clothed with legislative power. It may enforce, in its own appropriate way, the specific performance of an existing legal obligation arising out of contract, law, or usage, but it cannot create the obligation.

In the present case, the Atchison, Topeka & Santa Fé and the Denver & Rio Grande Companies formed their business connection and established their junction or joint station long before the Denver & New Orleans road was built. The Denver & New Orleans Company saw fit to make its junction with the Atchison, Topeka & Santa Fé Company at a different place. Under these circumstances, to hold that, if the Atchison, Topeka & Santa Fé continued to stop at its old station, after the Denver & New Orleans was built, a refusal to stop at the junction of the Denver & New Orleans was an unreasonable discrimination as to facilities in favor of the Denver & Rio Grande Company, and against the Denver & New Orleans, would be in effect to declare that every railroad company which forms a connection of its road with that of another company has a right, under the Constitution or at the common law, to require the company with which it connects to do a connecting business at the junction, if it does a similar business with any other company under any other circumstances. Such, we think, is not the law. It may be made so by the legislative department of the government, but it does not follow, as a necessary consequence, from the constitutional right of a mechanical union of tracks, or the constitutional prohibition against undue or unreasonable discriminations in facilities.

This necessarily disposes of the question of a continuous business, or a through line for passengers or freight, including through tickets, through bills of lading, through checking of baggage, and the like. Such a business does not necessarily follow from a connection of tracks. The connection may enable the companies to do such a business conveniently when it is established, but it does not of itself establish the business. The legislature cannot take away the right to a physical union of two roads, but whether a connecting business shall be done over them after the union is made depends on legislative regulation, or contract obligation. An interchange of cars, or the hauling by one company of the cars of the other, implies a stop at the junction to make the exchange or to take the cars. If there need be no stop, there need be no exchange or taking on of cars.

The only remaining questions are as to the obligation of the Atchison, Topeka & Santa Fé Company to carry for the Denver & New Orleans when passengers go to or freight is delivered at the regular stations, and the prices to be charged. As to the obligation to carry, there is no dispute, and we do not understand it to be claimed that carriage has ever been refused when applied for at the proper place. The controversy, and the only controversy, is about the place and the price.

That the price must be reasonable is conceded, and it is no doubt true that in determining what is reasonable the prices charged for business coming from or going to other roads connecting at Pueblo may be taken into consideration. But the relation of the Denver & New Orleans Company to the Atchison, Topeka & Santa Fé is that of a Pueblo customer, and it does not necessarily follow that the price which the Atchison, Topeka & Santa Fé gets for transportation to and from Pueblo, on a division of through rates among the component companies of a through line to Denver, must settle the Pueblo local rates. It may be that the local rates to and from Pueblo are too high, and that they ought to be reduced, but that is an entirely different question from a division of through rates. There is no complaint of a discrimination against the Denver & New Orleans Company in respect to the regular Pueblo rates; neither is there anything except the through rates to show that the local rates are too high. The bill does not seek to reduce the local rates, but only to get this company put into the same position as the Denver & Rio Grande on a division of through rates. This cannot be done until it is shown that the relative situations of the two companies with the Atchison, Topeka & Santa Fé, both as to the kind of service and as to the conditions under which it is to be performed, are substantially the same, so that what is reasonable for one must necessarily be reasonable for the other. When a business connection shall be established between the Denver & New Orleans Company and the Atchison, Topeka & Santa Fé at their junction, and a continuous line formed, different questions may

arise; but so long as the situation of the parties continues as it is now, we cannot say that, as a matter of law, the prices charged by the Atchison, Topeka & Santa Fé, for the transportation of persons and property coming from or going to the Denver & New Orleans, must necessarily be the same as are fixed for the continuous line over the Denver & Rio Grande.

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All the American cases to which our attention has been called by counsel relate either to what amounts to undue discrimination between the customers of a railroad company, or to the power of a court of chancery to interfere, if there is such a discrimination. None of them hold that, in the absence of statutory direction, or a specific contract, a company having the power to locate its own stopping-places can be required by a court of equity to stop at another railroad junction and interchange business, or that it must, under all circumstances, give one connecting road the same facilities and the same rates that it does to another with which it has entered into special contract relations for a continuous through line and arranged facilities accordingly. The cases are all instructive in their analogies, but their facts are different from those we have now to consider.

We have not referred specially to the tripartite agreement or its provisions, because, in our opinion, it has nothing to do with this case as it is now presented. The question here is whether the Denver & New Orleans Company would have the right to the relief it asks if there were no such contract, not whether the contract, if it exists, will be a bar to such a right. The real question in the case, as it now comes before us, is whether the relief required is legislative in its character or judicial. We think it is legislative, and that upon the existing facts a court of chancery can afford no remedy.

The decree of the Circuit Court is reversed, and the cause remanded with direction to dismiss the bill without prejudice.

STATE, EX REL. *v.* CINCINNATI, ETC. R. CO.

47 Ohio St. 130. 1890.

BRADBURY, J. These actions are brought under the fourth clause of sec. 6761, Revised Statutes, which authorize an action of *quo warranto* to be brought against a corporation "when it has misused a franchise, privilege, or right conferred upon it by law, or when it claims or holds by contract or otherwise, or has exercised a franchise, privilege, or right in contravention of law."

The petitions charge, among other things, that the defendants misused their corporate powers and franchises by discriminating in their rates of freight in favor of certain refiners of petroleum oil connected with the Standard Oil Company, by charging other shippers of like products unreasonable rates, by arbitrarily and suddenly changing the same, and finally, by confederating with the favored shippers to create and foster a monopoly in refined oil, to the injury of other refiners and the public; and further, that the defendants claimed and exercised, in contravention of law, the right to charge, for shipping oil in tank cars, a lower rate of freight per hundred pounds than they charged for shipping the same in barrels, in car-load lots. The defendant, by answer, among other matters, denied charging any shippers unreasonable rates of freight, or that they arbitrarily or suddenly changed such rates, and denied any confederacy with any one to establish a monopoly.

The actions were referred to a referee to take the evidence and to report to this court his findings of fact and conclusions of law therefrom; all which has been done, and the cases are before us upon this report.

To the report of the referee exceptions were filed by all parties. The defendants, however, do not now insist upon their exceptions to the finding of the referee in so far as it relates to the facts; indeed, it is difficult to conceive any grounds for their doing so, for these findings are mainly based upon the testimony of the officers and agents of the railroad companies.

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That the Cincinnati, Washington & Baltimore Railway Company did discriminate in its rates for freight on petroleum oil in favor of the Camden Consolidated Oil Company, and that the Cincinnati, New Orleans & Texas Pacific Railway Company did the same in favor of the Chess-Carly Company, is shown by the finding of the referee, which is clearly sustained by the evidence. That these discriminating rates were in some instances strikingly excessive, tended to foster a monopoly, tended to injure the competitors of the favored shippers and were in many instances prohibitory, actually excluding these competitors from extensive and valuable markets for their oil, giving to the favored shippers absolute control thereof, is established beyond any serious controversy. The justification interposed is that this was not done pursuant to any confederacy with the favored shipper or with any purpose to inflict injury on their competitors, but in order that the railroad companies might secure freight that would otherwise have been lost to them. This we do not think sufficient. We are not unmindful of the difficulties that stand in the way of prescribing a line of duty to a railway company, nor do we undertake to say they may not pursue their legitimate objects, and shape their policy to secure benefits to themselves, though it may press severely upon the interests of others; but we do hold that they

cannot be permitted to foster or create a monopoly, by giving to a favored shipper a discriminating rate of freight. As common carriers, their duty is to carry, indifferently, for all who may apply, and in the order in which the application is made and upon the same terms; and the assumption of a right to make discriminations in rates for freight, such as was claimed and exercised by the defendants in this case, on the ground that it thereby secured freight that it would otherwise lose, is a misuse of the rights and privileges conferred upon it by law. A full and complete discussion of the principles and a thorough collection of the authorities, bearing upon the duties of railroad companies toward their customers, is to be found in the opinion of Atherton, J., in the case of Scofield *v.* Railway, 43 Ohio St. 571, to which nothing need be now added.

It appears that of the two methods of shipping oil, that by the barrel in car-load lots and that in tank cars, the first only was available to George Rice and the other refiners of petroleum oil at Marietta, Ohio, as they owned no tank cars, nor did the defendants own or undertake to provide any; but that both methods were open to the Camden Consolidated Oil Company and the Chess-Carly Company, by reason of their ownership of tank cars, and that the rate per barrel in tank cars was very much lower than in barrel packages in box cars; that, in fact, the Cincinnati, Washington & Baltimore Railway Company, after allowing the Camden Consolidated Oil Company a rebate, and allowing the Baltimore & Ohio Railway Company for switching cars, received from the Camden Consolidated Oil Company only about one half the open rates it charged the Marietta refiners, and that both railroad companies claimed the right to make different rates, based upon the different methods of shipping oil, and the fact of the ownership by shippers of the tank cars used by them. It was the duty of the defendants to furnish suitable vehicles for transporting freight offered to them for that purpose, and to offer equal terms to all shippers. A railroad is an improved highway; the public are equally entitled to its use; it must provide equal accommodation for all upon the same terms. The fact that one shipper may be provided with vehicles of his own entitles him to no advantage over his competitor not so provided. The true rule is announced by the Interstate Commerce Commission, in the report of the case of George Rice *v.* The Louisville & Nashville Railroad Company *et al.* "The fact that the owner supplies the rolling stock when his oil is shipped in tanks, in our opinion, is entitled to little weight when rates are under consideration. It is properly the business of railroad companies to supply to their customers suitable vehicles of transportation (Railroad Co. *v.* Pratt, 22 Wall. 123), and then offer their use to everybody impartially." Page 50 of the report of the case. No doubt a shipper who owns cars may be paid a reasonable compensation for the use, so that the compensation is not made a cover for discriminating rates, or other advantages to such owner as a shipper.

Nor is there any valid objection to such owner using them exclusively, as long as the carrier provides equal accommodations to its other customers. It may be claimed that if a railroad company permit all shippers indifferently, and upon equal terms, to provide cars suitable for their business, and to use them exclusively, no discrimination is made. This may be theoretically true, but it is not so in its application to the actual state of the business of the country; for a very large portion of the customers of a railroad have not a volume of business large enough to warrant equipping themselves with cars, and might be put at a ruinous disadvantage in the attempt to compete with more extensive establishments. Aside from this, however, a shipper is not bound to provide a car; the duty of providing suitable facilities for its customers rests upon the railroad company, and if, instead of providing sufficient and suitable cars itself, this is done by certain of its customers even for their own convenience, yet the cars thus provided are to be regarded as part of the equipments of the road. It being the duty of a railroad company to transport freight for all persons indifferently, and in the order in which its transportation is applied for, it cannot be permitted to suffer freight cars to be placed upon its track by any customer for his private use, except upon the condition that, if it does not provide other cars sufficient to transport the freight of other customers in the order application is made, they may be used for that purpose. Were this not so, a mode of discrimination, fatal to all successful competition by small establishments and operators with large and more opulent ones, could be successfully adopted and practised at the will of the railroad company and the favored shipper.

The advantages, if any, to the carrier, presented by the tank-car method of transporting oil, over that by barrels in box cars in car-load lots, are not sufficient to justify any substantial difference in the rate of freight for oil transported in that way; but if there were any such advantages, as it is the duty of the carrier to furnish proper vehicles for transporting it, if it failed in this duty it could not in justice avail itself of its own neglect as a ground of discrimination. It must either provide tank cars for all its customers alike, or give such rates of freight in barrel packages, by the car-load, as will place its customers using that method on an equal footing with its customers adopting the other method.

Judgment ousting defendants from the right to make or charge a rate of freight per hundred pounds for transporting oil in iron tank cars, substantially lower than for transporting it in barrels, in car-load lots.

b. *For a reasonable compensation.*

BASTARD *v.* BASTARD.

King's Bench. 2 Shower, 81. 1679.

Case against the defendant as a common carrier, for a box delivered to him to be carried to B. and lost by negligence.

Williams moved in arrest of judgment, for that there was no particular sum mentioned to be paid or promised for hire, but only *pro mercede rationabili*; resolved well enough, and judgment given pro plaintiff; for perhaps there was no particular agreement, and then the carrier might have a *quantum meruit* for his hire, and he is therefore as chargeable for the loss of the goods in the one case as the other.

RAGAN & BUFFET *v.* AIKEN.

9 Lea (Tenn.), 609. 1882.

Cooper, J. . . . . .

The third ground of demurrer is that the facts stated in the bill do not show a case of improper discrimination within the meaning of the franchises under which the defendant is operating his road. The facts are that the defendant, to induce merchants in Lee County, Virginia, and Hancock County, Tennessee, to ship over his road, instead of taking a different route, has entered into a contract with them not to charge exceeding 15 cents per hundred pounds on their goods. And the question is whether the defendant can make such a contract, under the circumstances stated.

The English authorities hold that at common law the common carrier is not bound to carry at equal rates for all customers in like condition. The authorities are collected in McDuffee *v.* Portland & Rochester Railroad, 52 N. H. 430, and in 3 Am. & Eng. R. Cas. 602. In this country, the courts have generally held otherwise, and that statutes prohibiting discrimination are merely declaratory of the common law. Sinking Fund Cases, 99 U. S. 17; Messenger *v.* Pennsylvania Railroad Company, 36 N. J. L. 407, 531. Discrimination in rates of freight, if fair and reasonable, and founded on grounds consistent with the public interest, are allowable. Hersh *v.* Northern, etc. Railroad Company, 74 Pa. St. 181; Chicago, etc. Railroad Company *v.* People, 67 Ill. 11; Fitchburg Railroad Company *v.* Gage, 12 Gray, 393. The important point to every freighter

is that the charge shall be reasonable, and a right of action will not exist in favor of any one unless it be shown that unreasonable inequality had been made to his detriment. A reasonable price paid by such a party is not made unreasonable by a less price paid by others. Or, as said by Crompton, J., to the plaintiff, upon the trial of such a suit: "The charging another party too little is not charging you too much." Garten *v.* B. & E. Railroad Company, 1 B. & S. 112, 154, 165; McDuffee *v.* Portland & Rochester Railroad, 52 N. H. 430. In determining whether a company has given undue preference to a particular person, the court may look to the interests of the company: Ransome *v.* Eastern Counties Railway, 1 C. B. N. S. 437; 1 id. 135.

In other words, if the charge on the goods of the party complaining is reasonable, and such as the company would be required to adhere to as to all persons in like condition, it may, nevertheless, lower the charge to another person if it be to the advantage of the company, not inconsistent with the public interest, and based on a sufficient reason. It is obvious that the intention of the defendant, in this instance, was not to discriminate against the complainants in favor of any person of the same place, and in the same condition. His object was to get business for his road from persons at a distance from its terminus, which otherwise would reach their destination by a different route. Under these circumstances, we cannot see that the contracts complained of are against public policy, or that the complainants have been damaged, if the charges on their goods were reasonable. The bill contains no allegation that the charges made against, and paid by, the complainants were unreasonable. Without such an averment there has been no damage. The third ground of demurrer was, therefore, well taken.[1]

CHICAGO, BURLINGTON & QUINCY R. CO. *v.* IOWA.

94 U. S. 155. 1876.

APPEAL from the Circuit Court of the United States for the District of Iowa.

Mr. Chief Justice WAITE. Railroad companies are carriers for hire. They are incorporated as such, and given extraordinary powers, in order that they may the better serve the public in that capacity. They are, therefore, engaged in a public employment affecting the public interest, and, under the decision in Munn *v.* Illinois, 94 U. S. 113 [**1**], subject to legislative control as to their rates of fare and freight, unless protected by their charters.

[1] *Acc.:* Fitchburg R. Co. *v.* Gage, 12 Gray, 393; Ex parte Benson, 18 S. C. 38; Johnson *v.* Pensacola, etc. R. Co., 16 Fla. 623.

The Burlington and Missouri River Railroad Company, the benefit of whose charter the Chicago, Burlington and Quincy Railroad Company now claims, was organized under the general corporation law of Iowa, with power to contract, in reference to its business, the same as private individuals, and to establish by-laws and make all rules and regulations deemed expedient in relation to its affairs, but being subject, nevertheless, at all times to such rules and regulations as the general assembly of Iowa might from time to time enact and provide. This is, in substance, its charter, and to that extent it is protected as by a contract; for it is now too late to contend that the charter of a corporation is not a contract within the meaning of that clause in the Constitution of the United States which prohibits a State from passing any law impairing the obligation of a contract. Whatever is granted is secured subject only to the limitations and reservations in the charter or in the laws or constitutions which govern it.

This company, in the transactions of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But when the legislature steps in and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business. It was within the power of the company to call upon the legislature to fix permanently this limit, and make it a part of the charter; and, if it was refused, to abstain from building the road and establishing the contemplated business. If that had been done, the charter might have presented a contract against future legislative interference. But it was not; and the company invested its capital, relying upon the good faith of the people and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation.

It is a matter of no importance that the power of regulation now under consideration was not exercised for more than twenty years after this company was organized. A power of government which actually exists is not lost by non-user. A good government never puts forth its extraordinary powers, except under circumstances which require it. That government is the best which, while performing all its duties, interferes the least with the lawful pursuits of its people.

In 1691, during the third year of the reign of William and Mary, Parliament provided for the regulation of the rates of charges by common carriers. This statute remained in force, with some amendment, until 1827, when it was repealed, and it has never been re-enacted. No one supposes that the power to restore its pro-

visions has been lost. A change of circumstances seemed to render such a regulation no longer necessary, and it was abandoned for the time. The power was not surrendered. That remains for future exercise, when required. So here, the power of regulation existed from the beginning, but it was not exercised until in the judgment of the body politic the condition of things was such as to render it necessary for the common good.

Neither does it affect the case that before the power was exercised the company had pledged its income as security for the payment of debts incurred, and had leased its road to a tenant that relied upon the earnings for the means of paying the agreed rent. The company could not grant or pledge more than it had to give. After the pledge and after the lease the property remained within the jurisdiction of the State, and continued subject to the same governmental powers that existed before.

The objection that the statute complained of is void because it amounts to a regulation of commerce among the States, has been sufficiently considered in the case of Munn *v.* Illinois. This road, like the warehouse in that case, is situated within the limits of a single State. Its business is carried on there, and its regulation is a matter of domestic concern. It is employed in State as well as in interstate commerce, and, until Congress acts, the State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected.

It remains only to consider whether the statute is in conflict with sec. 4, art. 1, of the Constitution of Iowa, which provides that "all laws of a general nature shall have a uniform operation," and that "the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

The statute divides the railroads of the State into classes, according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the Constitution requires. The Supreme Court of the State, in the case of McAunich *v.* M. & M. Railroad Co., 20 Iowa, 343, in speaking of legislation as a class, said, "These laws are general and uniform, not because they operate upon every person in the State, for they do not, but because every person who is brought within the relation and circumstances provided for is affected by law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation." This act does not grant to any railroad company privileges or immunities which, upon the same terms, do not equally belong to every other railroad company. Whenever a company comes into

any class, it has all the "privileges and immunities" that have been granted by the statute to any other company in that class.

It is very clear that a uniform rate of charges for all railroad companies in the State might operate unjustly upon some. It was proper, therefore, to provide in some way for an adaptation of the rates to the circumstances of the different roads; and the general assembly, in the exercise of its legislative discretion, has seen fit to do this by a system of classification. Whether this was the best that could have been done is not for us to decide. Our province is only to determine whether it could be done at all, and under any circumstances. If it could, the legislature must decide for itself, subject to no control from us, whether the common good requires that it should be done. *Decree affirmed.*

Mr. Justice Field and Mr. Justice Strong dissented.

REAGAN *v.* FARMERS' LOAN & TRUST CO.

154 U. S. 362. 1894.

Mr. Justice Brewer. . . . . .

It appears from the bill that, in pursuance of the powers given to it by this act, the State commission [Reagan *et al.*] has made a body of rates for fares and freights. This body of rates, as a whole, is challenged by the plaintiff [defendant in error, trustee under a railroad trust deed] as unreasonable, unjust, and working a destruction of its rights of property. The defendant denies the power of the court to entertain an inquiry into that matter, insisting that the fixing of rates for carriage by a public carrier is a matter wholly within the power of the legislative department of the government and beyond examination by the courts.

It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribed the rates. The courts are not authorized to revise or change the body of rates imposed by a legislature or commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers

and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation. In Chicago, Burlington & Quincy Railroad *v.* Iowa, 94 U. S. 155 [89], and Peik *v.* Chicago & Northwestern Railway, 94 U. S. 164, the question of legislative control over railroads was presented, and it was held that the fixing of rates was not a matter within the absolute discretion of the carriers, but was subject to legislative control. As stated by Justice Miller, in Wabash, etc. Railway *v.* Illinois, 118 U. S. 557, 569, in respect to those cases:

"The great question to be decided, and which was decided, and which was argued in all those cases, was the right of the State, within which a railroad company did business, to regulate or limit the amount of any of these traffic charges."

There was in those cases no decision as to the extent of control, but only as to the right of control. This question came again before this court in Railroad Commission Cases, 116 U. S. 307, 331, and while the right of control was re-affirmed, a limitation on that right was plainly intimated in the following words of the Chief Justice:

"From what had thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

This language was quoted in the subsequent case of Dow *v.* Beidelman, 125 U. S. 680, 689. Again, in Chicago & St. Paul Railway *v.* Minnesota, 134 U. S. 418, 458, it was said by Mr. Justice Blatchford, speaking for the majority of the court: —

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring the process of law for its determination."

And in Chicago & Grand Trunk Railway *v.* Wellman, 143 U. S. 339, 344, is this declaration of the law: —

"The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."

Budd *v.* New York, 143 U. S. 517, announces nothing to the contrary. The question there was not whether the rates were reasonable, but whether the business, that of elevating grain, was within legislative control as to the matter of rates. It was said in the opinion: "In the cases before us, the records do not show that

the charges fixed by the statute are unreasonable." Hence there was no occasion for saying anything as to the power or duty of the courts in case the rates as established had been found to be unreasonable. It was enough that upon examination it appeared that there was no evidence upon which it could be adjudged that the rates were in fact open to objection on that ground.

These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held. It was, therefore, within the competency of the Circuit Court of the United States for the Western District of Texas, at the instance of the plaintiff, a citizen of another State, to enter upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission. Indeed, it was in so doing only exercising a power expressly named in the act creating the commission.

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4. CARRIER'S LIABILITY.

a. *Act of God.*

PROPRIETORS OF THE TRENT NAVIGATION *v.* WOOD.

King's Bench. 3 Esp. 127. 1785.

This was an action of *assumpsit*.

The declaration stated that the plaintiffs, as proprietors of the Trent Navigation, undertook to carry the defendant's goods from Hull to Gainsborough; that in the river Humber, the vessel on board which the defendant's goods were, sunk, by driving against an anchor in the river; and the goods were, in consequence of the accident, considerably damaged. That the plaintiffs repaired the damage the goods had sustained, and sent them home to the defendant; and the breach was, that the defendant refused to pay the money the plaintiffs had expended in the recovery of the goods. There was also a count in the declaration for money had and received, which was for freight. At the trial the plaintiffs were nonsuited.

A rule having been obtained, to show cause why the nonsuit should not be set aside, it came on to be argued on this.

The counsel for the defendant being desired to begin, — *Cowper* contended, that the defendant was not liable to pay this money; there was no pretence to say that the accident happened from the act of God; for it was expressly stated and proved that the accident was occasioned by the negligence of the persons on board a barge in the river, in not having his buoy out, to mark the place where his anchor lay. A great deal of evidence was adduced at the trial to prove this; but, as between the carriers and the owners of the goods, the misconduct of a third person is immaterial, since a remedy lies over against the party so offending. The plaintiffs would have been liable had the goods been totally lost; and therefore *a fortiori* shall answer this damage themselves.

Bower, on the same side. The question is, Whether the plaintiffs as carriers are liable for the damage done to the goods in question? The law in all cases throws the burden, when there is a loss, upon a common carrier, even if the goods are taken by robbery, where it is impossible for him to save them; and the reason is, to prevent any collusion between him and the thief. He is certainly liable in all cases, except the two, of accidents happening by the act of God, or of the king's enemies. Here is no pretence for either. A damage taking place by a natural accident that could not be foreseen, may be called the act of God; but this arose from the miscon-

duct of a third person, and cannot therefore come within the meaning of that expression.

Bearcroft, for the plaintiffs. This is a question that concerns all common carriers; they are the bailees of goods; and as they get a profit by this undertaking, they are also liable to answer for losses, if the smallest degree of negligence is proved; but in the present case there was no possibility of seeing or knowing of the anchor that did the mischief, and therefore the accident happened from an inevitable necessity; which, though it may not come up to the precise idea of the act of God, is yet such a necessity as affords a justification to the plaintiffs.

Homer, on the same side. There is no neglect proved on the part of the plaintiffs; and as to the remedy over against a third person, it must first be determined who are immediately answerable for the loss, before it can be known who is entitled to this remedy. It was in evidence at the trial, that there is considerable danger in the voyage from Hull to Gainsborough, and that it is therefore usual for the owners of the goods to insure them; and as there was no insurance in this case, but only the price of the freight, which has been paid into court, I contend that it was only a special acceptance on the part of the plaintiffs, and therefore that they are not liable for the loss occasioned by the accident which has happened. It is like a voyage to the East Indies; and as there is a great risk in all sea-voyages, it would be very unreasonable to make a party liable generally to answer the loss where he has not stipulated for the purpose. The evidence at the trial of an usage to insure goods for this voyage varies the case very much from that of a common carrier, where there is no insurance: therefore, as it appears that there was a special acceptance in this case, the plaintiffs are not liable to answer the damages done to the goods.

Lord MANSFIELD asked, if there was any case which made distinction between a land and a water carrier. And, none being mentioned, *Cowper*, in reply, put a case of an East Indian in the Downs running down another vessel; and said that the owners of the vessel run down would certainly have an action against the other for the damage, and would also be liable as common carriers to their employers. That this accident happened in the river Humber, clearly *infra corpus comitatus*; and therefore was not a sea-voyage. A custom to insure was certainly proved; but because it is usual, a man is not obliged to do it; and a carrier will be equally answerable. If a man pleases, he may insure his goods by the Chester wagon; but if he does, still the wagoner must be liable in case of a loss.

Lord MANSFIELD. This is certainly a sea-voyage. It is a general question, and no case has been cited exactly in point; but it is clear that the carrier is liable in all cases, except for accidents happening by the act of God or by the king's enemies. The act of God is a natural necessity, and inevitably such, as winds, storms, etc.

The case of robbery is certainly very strong, but not a natural necessity; and in this case there is an injury by a private man, within the reason of the instance of robbery; yet I think the carriers ought to be liable. There is some sort of negligence here; for as the buoy could not be seen, there should have been, on that account, a greater degree of caution used.

WILLES, Justice, of the same opinion.

ASHHURST, Justice. The general rule is, that the carrier is liable in every instance, except for accidents happening by the act of God or the king's enemies; but another rule is now attempted to be set up; which is, that the carrier ought not to be liable, where no negligence is imputable to him; but no case has been cited to prove this doctrine; and I think that good policy and convenience require the rule to be adhered to which has hitherto prevailed. It will naturally lead to make carriers more careful in general. If this sort of negligence were to excuse the carrier, when he finds that an accident has happened to goods from the misconduct of a third person, he would give himself no farther trouble about the recovery of them; nor do I think that in this case the carrier is entirely free from every imputation of negligence. His not seeing the buoy ought to have put him upon inquiring more minutely about the anchor.

BULLER, Justice. This case is very different from those relied upon by the plaintiffs; two grounds have been made for the plaintiffs: first, That upon general principles of law they are not liable; and secondly, That they are not liable, because this was a special acceptance, which excluded the risks of the sea; but for this there is no color at all. It was proved, at the trial, that it was usual to insure; but that does not show that the carrier is not liable where there is no insurance: the merchant is not bound to insure, nor does that vary the obligation. Neither is it to be presumed, that because the price of insurance is low, this risk is excluded when not insured; the carrier knows the degree of danger, and proportions his premium accordingly.

As to the general principle, there is no distinction between a land and a water carrier. In the case of a robbery the carrier is subject to force which he cannot resist; yet he shall be liable. In this case, I think there was a degree of negligence in point of fact; but the negligence in point of law was sufficient.

Rule discharged.

FORWARD *v.* PITTARD.

King's Bench. 1 Term R. 27. 1785.

THIS was an action on the case against the defendant as a common carrier, for not safely carrying and delivering the plaintiff's goods.

This action was tried at the last summer assizes at Dorchester, before Mr. Baron Perryn, when the jury found a verdict for the plaintiff, subject to the opinion of the court on the following case:

"The defendant was a common carrier from London to Shaftsbury. That on Thursday the 14th of October, 1784, the plaintiff delivered to him on Weyhill twelve pockets of hops to be carried by him to Andover, and to be by him forwarded to Shaftsbury by his public road wagon, which travels from London through Andover to Shaftsbury. That, by the course of travelling, such wagon was not to leave Andover till the Saturday evening following. That in the night of the following day after the delivery of the hops, a fire broke out in a booth at the distance of one hundred yards from the booth in which the defendant had deposited the hops, which burnt for some time with unextinguishable violence, and during that time communicated itself to the said booth in which the defendant had deposited the hops, and entirely consumed them without any actual negligence in the defendant. That the fire was not occasioned by lightning."

N. Bond, for the plaintiff. The question is, whether a carrier is liable for the loss of goods occasioned by fire, without any negligence in him or his servants. The general proposition is, that the carrier is liable in all cases, except the loss be occasioned by the act of God or the king's enemies. Lord Raymond, 909; 1 Wils. 281. And this doctrine has lately been recognized by this Court, in the case of the Company of the Trent Navigation *v.* Wood. East. 25 Geo. 3 B. R. The only doubt is on the construction of the words "the act of God." It is an effect immediately produced without the interposition of any human cause. In Amies and Stephens, 1 Stra. 128, these words were held to include the case of a ship being lost by tempest. In the books, under the head of "waste," there is an analogous distinction to be found: if a house fall down by tempest, or be burned by lightning, it is no waste; but burning by negligence or mischance is waste. Co. Lit. 53, *a*, *b*.

Before the 6th of Anne, 6 Ann. c. 31; 10 Ann. c. 14, an action lay against any person in whose house a fire accidentally began: this shows that an accidental fire was not in law considered as the act of God; but the person was punishable for negligence. Suppose a fire happens in a house where there are different lodgers, each of whose lodgings is considered as a separate house: if the fire be communicated from one lodging to another, and the Court say the first fire was the act of man, at what time will it be said that it ceases to be the act of man and commences to be the act of God? If it were not the act of man in the first house, it is impossible to draw the line. In the case of the Company of the Trent Navigation and Wood, Lord Mansfield said, "By the act of God is meant a natural, not merely an inevitable, accident."

If it be contended for the defendant that it is here stated that

there was no actual negligence, that will not serve him; for this action was not founded in negligence. Lord Holt says, there are several species of bailments, and different degrees of liability annexed to each; and a carrier is that kind of bailee who is answerable though there be no actual negligence.

Borough, for the defendant, observed that the point in this case was not before the Court in any of the cases cited. The general question here is, whether a carrier is compellable to make satisfaction for goods delivered to him to carry, and destroyed by mere accident, in a case where negligence is so far from being imputed to him that it is expressly negatived? This action of assumpsit must be considered as an action founded on what is called the custom of the realm relating to carriers. And from a review of all the cases on this subject it manifestly appears that a carrier is only liable for damage and loss occasioned by the acts or negligence of himself and servants, that is, for such damage and loss only as human care or foresight can prevent; and that there is no implied contract between him and his employers to indemnify them against unavoidable accidents. The law with respect to land carriers and water carriers is the same. Rich *v.* Kneeland, Cro. Jac. 330; Hob. 17, 5 Burr. 2827.

In Vid. 27. The declaration, in an action against a waterman for negligently keeping his goods, states the custom relative to carriers thus, "*absque substractione, amissione, seu spoliatione, portare tenentur, ita quod pro defectu dictorum communium portatorum seu servientium suorum, hujusmodi bona et catalla eis sic ut prefertur deliberata, non sint perdita, amissa, seu spoliata.*" It then states the breach, that the defendant had not delivered them, and "*pro defectu bonæ custodiæ ipsius defendentis et servientium suorum perdita et amissa fuerunt.*" In Brownl. Red. 12, the breach in a declaration against a carrier is, "*defendens tam negligenter et improvide custodivit et carriavit, &c.*" In Clift. 38, 39, Mod. Intr. 91, 92, and Herne, 76, the entries are to the same effect. In Rich and Kneeland, Hob. 17, the custom is stated in a similar way; and in the Exchequer Chamber it was resolved, "that though it was laid as a custom of the realm, yet indeed it is common law." On considering these cases, it is not true that "the act of God and of the king's enemies" is an exception from the law. For an exception is always of something comprehended within the rule, and therefore excepted out of it; but the act of God and of the king's enemies is not within the law as laid down in the books cited.

All the authorities cited by the counsel for the plaintiff are founded on the dictum in Coggs *v.* Bernard, 2 Lord Raymond, 909, where this doctrine was first laid down; but Lord Holt did not mean to state the proposition in the sense in which it has been contended he did state it. He did not intend to say, that cases falling within the reasoning of what are vulgarly called "acts of God" should not

also be good defences for a carrier. After saying (Lord Raymond, 918), "the law charges the persons, thus intrusted to carry goods, against all events but the acts of God and of the enemies of the king," he proceeds thus, "for though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons who had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered." As Lord Holt therefore states the responsibility of carriers in case of robbery to take its origin from a ground of policy, he could not mean to say that a carrier was also liable in cases of accidents, where neither combination or negligence can possibly exist.

It appears from the Doctor and Student (Dial. 2, c. 38, p. 270) that, at the time that book was written, the carrier was held liable for robberies which diligence and foresight might prevent. And what is there said agrees precisely with the custom, and does not bear hard on the carrier. If he will travel by night, and is robbed, he has no remedy against the hundred; for then he is not protected by the statute of Winton, and he ought to be answerable to the employer. If he travel by day and is robbed, he has a remedy. Now the carrier may not perhaps be worth suing; and the employer may bring the action against the hundred in his own name; which action he would be deprived of, if the carrier travelled by night.

There is not a single authority in all the old books which says that a carrier is responsible for mere accidents. He only engages against substraction, spoil, and loss, occasioned by the neglect of himself or his servants. These words plainly point at acts to be done, and omissions of care and diligence. But in the present case there is no act done; and there cannot be said to be any omission of care and diligence, since they could not have prevented the calamity.

Lord Holt, in Coggs *v.* Bernard, seems to have traced, with great attention, the different species of bailments. He cites many passages from Bracton, who has nearly copied them from Justinian. So that it is probable that the custom relating to carriers took its origin from the civil law as to bailments. Now it is observable that in no one case of bailment is the bailee answerable for an accident; he is only liable for want of diligence. The only difference in this respect between the civil and the English law is, that the former (Justin. lib. 3, 15, s. 2, 3, 4, tit. 35, s. 5) distinguishes between the different degrees of diligence required in the different species of bailment; which the latter does not.

In all the cases to be found in our books may be traced the true ground of liability, negligence. If the law were not as is now contended for, the question of negligence could never have arisen; and the case of robbery could not have borne any argument; whereas the case of Mors *v.* Slue, 1 Vent. 190, 238, [**114**] came on repeatedly before the Court, and created very considerable doubts.

In the case of Dale *v.* Hall, 1 Wils. 281, and the Proprietors of the Trent Navigation *v.* Wood, 3 Esp. 127 [**95**], there were clear facts of negligence. In the first, the rats gnawed a hole in the hoy, which undoubtedly might have been prevented. And in the other, each of the judges, in giving his opinion, said there was negligence.

In the Year Books, 22 Ass. 41, there is a case of an action against a waterman for overloading his boat so that the plaintiff's horse was drowned. This case is recognized in Williams *v.* Lloyd, S. W. Jones, 180, where it is said "it was there agreed that if he had not surcharged the boat, although the horse was drowned, no action lies, notwithstanding the assumpsit; but if he surcharged the boat, otherwise; for there is default and negligence in the party." The Court in 22 Ass. 41, said, "it seems that you trespassed when you surcharged the boat by which the horse perished." The same case is to be found in 1 Ro. Abr. 10, pl. 18, Bro. Tit. Action sur le Case 78. And it is also recognized in Williams *v.* Hide and Ux. Palm. 548.

In Winch. 26. To an action against a carrier, there is a special plea that the inn in which the goods were deposited was burned by fire, and that the plaintiff's goods were at the same time destroyed, without the default or neglect of the defendant or his servants. To this the plaintiff demurred, not generally but specially, "that the plea amounted to the general issue."

In all actions founded in negligence, the negligence is alleged and tried, as a fact; as in actions against a farrier, smith, coachman, etc. It is the constant course in such actions to leave the question of negligence to the jury. It appears in Dalston *v.* Janson, 5 Mod. 90, that the defendant formerly used to plead particularly to the neglect. In 43 Edw. 3, 33; Clerk's Assist. 99; Mod. Intr. 95, and Brown. Red. 101, which were actions founded in negligence, the negligence is traversed. Now a traverse can be only of matter of fact. And here negligence is expressly negatived by the case.

However, if the Court should be of the opinion that the carrier is answerable for every loss, unless occasioned by the act of God or the king's enemies, he then contended that, as the act of God was a good ground of defence, this accident, though not within the *words*, was within the *reason*, of that ground. It cannot be said that misfortunes occasioned by lightning, rain, wind, etc., are the immediate acts of the Almighty; they are permitted, but not directed by him. The reason why these accidents are not held to charge a carrier, is, that they are not under the control of the contracting

party, and therefore cannot affect the contract, inasmuch as he engages only against those events which by possibility he may prevent. Lord Bacon, in his Law Tracts, commenting on this maxim, *Reg. 5. necessitas inducit privilegium quoad jura privata*, says, "the law charges no man with default where the act is compulsory and not voluntary, and where there is not a consent and election; therefore, if either there be an impossibility for a man to do otherwise, or so great a perturbation of the judgment and reason as in presumption of law man's nature cannot overcome, such necessity carrieth a privilege in itself." Necessity, he says, is of three sorts, and under the third, he adds, "If a fire be taken in a street, I may justify pulling down the walls or house of another man to save the row from the spreading of the fire." Now in the present case, if any person, in order to stop the progress of the flames, had insisted on pulling down the booth wherein the hops were deposited, and in doing this the hops would have been damaged, the carrier would not have been liable to make good such damage; for it would have been unlawful for him to have prevented the pulling down the booth.

It is expressly found, in the present case, that the fire burnt with unextinguishable violence. The breaking out of the fire was an event which God only could foresee. And the course it would take was as little to be discovered by human penetration.

Bond, in reply. There are several strong cases where there could not be any negligence. It is not sufficient in these cases to negative any negligence; for everything is negligence which the law does not excuse, 1 Wils. 282. And the question here is, is this a case which the law does excuse? In Goffe *v.* Clinkard, cited in Wils. 282, there was all possible care on the part of the defendants. The judgment in the case of Gibbon *v.* Peyton and another, 4 Burr. 2298, which was an action against a stagecoachman for not delivering money sent, is extremely strong; there Lord Mansfield said, 4 Burr. 2030, "a common carrier, in respect of the premium he is to receive, runs the risk of them, and must make good the loss, though it happen without any fault in him; the reward making him answerable for their safe delivery."

That a carrier was liable in the case of a robbery was first held in 9 Ed. 4, pl. 40.

A bailee only engages to take care of his goods as his own, and is not answerable for a robbery; but a carrier insures. 1 Ventr. 190, 238; Sir T. Raym. 220, s. c.; 1 Mod. 85.

In Barclay and Heygena, E. 24, G. 3, B. R., which was an action against a master of a ship to recover the value of some goods put on board his ship in order to be carried to St. Sebastian; it was proved that an irresistible force broke into the ship in the river Thames, and stole the goods; yet the defendant was held answerable. In Sutton and Mitchel, at the sittings at Guildhall after Tr. 25, G. 3, the question was not disputed as far as to the value of the ship and freight.

There is no distinction between that case and a land carrier. And there can be no hardship in the Court's determining in favor of the plaintiff; for when the law is once known and established, the parties may contract according to the terms which it prescribes.

As to negligence being a matter of fact, that is answered by the decision in the Company of the Trent Navigation against Wood.

Lord MANSFIELD. There is a nicety of distinction between the act of God and inevitable necessity. In these cases actual negligence is not necessary to support the action. *Cur. adv. vult.*

Afterward Lord Mansfield delivered the unanimous opinion of the Court.

After stating the case — The question is, whether the common carrier is liable in this case of fire? It appears from all the cases for one hundred years back, that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, — that is, by the common law; a carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God or the king's enemies. Now what is the act of God? I consider it to mean something in opposition to the act of man; for everything is the act of God that happens by his permission; everything by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests.

If an armed force come to rob the carrier of the goods, he is liable; and a reason is given in the books, which is a bad one, viz., that he ought to have a sufficient force to repel it; but that would be impossible in some cases, as, for instance, in the riots in the year 1780. The true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil.

In this case, it does not appear but that the fire arose from the act of some man or other. It certainly did arise from some act of man; for it is expressly stated not to have happened by lightning. The carrier therefore in this case is liable, inasmuch as he is liable for inevitable accident.

Judgment for the plaintiff.

COLT *v.* M'MECHEN.

6 Johns. (N. Y. Sup. Ct.) 160. 1810.

This was an action on the case, against the defendant, as a common carrier of goods for hire, in a certain sloop, called the "Margaret," between Kinderhook and New York, on the Hudson River. The declaration stated that the plaintiffs were possessed of certain goods, etc., which the defendant, by his servant Matthew M'Kean, master of the said sloop, received on board to carry, transport, and convey from New York to Kinderhook landing, for a reasonable price or compensation, etc., but that the goods were never delivered, etc. Plea, not guilty.

Spencer, J. The plaintiffs have moved for a new trial on two grounds: 1st, For a misdirection to the jury, in stating that the failure of the wind was the act of God; and, 2d, For that the verdict was against evidence, on the point submitted to the jury, in relation to the negligence or carelessness of the master of the sloop, after she struck.

There can be no contrariety of opinion, on the law which renders common carriers liable. However rigid the rule may be, they are responsible for every injury done to goods intrusted to them to carry, unless it proceeds from the act of God, or the enemies of the land. What shall be considered the act of God, as contra-distinguished from an act resulting from human means, affords the only difficulty in the case.

The cause was summed up to the jury on this point, "that if they were satisfied from the whole evidence, that the vessel ran ashore in consequence of the sudden failure of the wind, the law would consider it as the act of God, and exculpate the defendant." By finding a verdict for the defendant, the jury have believed the testimony of Captain M'Kean, and the other witnesses produced by the defendant, in their account of the manner and circumstances under which the vessel grounded. The substance of that testimony is, that the vessel being on her passage from New York to Kinderhook, late in the month of November, 1809, proceeded on the passage to West Camp, where the vessel came to, from thence they weighed anchor and beat against the wind; from the lateness of the season, and for fear of ice, the captain was anxious to make Livingston's dock, which was considered a place of safety, and at which they had nearly arrived, when the accident happened; that the wind was light and variable, but sufficient to enable them to make considerable progress, and would have been sufficient, if it had continued, to have enabled them to have reached the dock, in a few more tacks; they were standing for the west shore, and had approached it, as near as usual and proper, when they put down the helm to bring her

about, the jib sail began to fill, the vessel partly changed her tack, when the wind suddenly ceased blowing, and the headway under which the vessel was, shot her on the bank. Captain M'Kean states, that he was well acquainted with the shore, and had before approached as near as he did then, when beating to windward; and that, when standing for the west shore, he had wind enough to enable him to manage the vessel with safety; that as the water fell, the stern of the sloop settled, and did not rise until flood tide, in consequence of which the water rushed in at the windows, and thereby the plaintiff's goods were wet and damaged. He states, distinctly, that the sudden and entire failure of the wind was the sole cause of the vessel's grounding.

The case of Amies *v.* Stevens, 1 Str. 128, shows that a sudden gust of wind, by which the hoy of the carrier, shooting a bridge, was driven against a pier and overset, by the violence of the shock, has been adjudged to be the act of God, or *vis divina*. The sudden gust, in the case of the hoyman, and the sudden and entire failure of the wind sufficient to enable the vessel to beat, are equally to be considered the acts of God. He caused the gust to blow in the one case; and in the other, the wind was stayed by Him.

It has been said, that the captain was guilty of negligence in attempting to beat, and in approaching the shore as near as he did when the disaster happened, the wind being, as he states, light and variable. It may be observed, that the master had his choice of alternatives, either to improve the wind he then had, in order to reach a place of safety, or to be exposed, in the middle of the river, to the effects of ice. The season of the year, and the interests of all concerned, justified the captain in attempting to reach Livingston's dock. It was not, as I recollect, pretended, on the trial, that his conduct was improper and unusual, in approaching the shore as near as he did on the tack in which the vessel grounded; at all events, the case does not show that the judge expressed any opinion on that point; and the plaintiff must have had the full benefit of that objection to the captain's conduct. I should undoubtedly have been of opinion, as the captain was situated, taking into view the lateness of the season, the narrowness of the channel, and the fact that he was not nearer the shore than is usual and customary in beating, that he was not guilty of negligence or improper conduct in that respect.

No rule of law having been violated, in the charge to the jury, if there even were grounds for saying that there is some degree of negligence imputable to the master, that point has been under the consideration of the jury, or it was not insisted on before them, and, in either case, when the plaintiffs attempt to fix the defendants with a loss from a very rigid rule of law, I should not disturb the verdict of a jury, to give them another opportunity to urge that objection. In the case of The Proprietors of the Trent Navigation

v. Wood, the vessel was sunk, by driving against an anchor, in the river Humber, and the goods were considerably damaged by the accident; it was not pretended by the counsel that this was the act of God, and Lord Mansfield considered it the injury of a private man, within the reason of the instance of robbery. Abbott, in his notice of this case (Abbott, 256), observes that both parties were held to have been guilty of negligence, the one in leaving his anchor without a buoy, the other in not avoiding it: as when he saw the vessel in the river, he must have known that there was an anchor near at hand; or if it was to be taken, that negligence was imputable only to the master, who had left his anchor without a buoy, that he was answerable over to the masters and owners of the vessel, whose cargo had been injured. Again, he observes (p. 227), that if a ship is forced on a rock or shallow, by adverse winds or tempests, or if the shallow was occasioned by a recent collection of sand, where ships could before sail with safety, the loss is to be attributed to the act of God, or the perils of the sea. Upon a position so plain, in my apprehension, as that the sudden cessation of a wind which was competent, at the very moment when the vessel began to come about, for the avoidance of the shoal, was the act of God, and did not arise from the fault or negligence of man, I am at a loss for further illustration.

The second point, on which a new trial is sought, was fairly and fully before the jury; and without entering upon it further, I cannot but express my perfect concurrence in opinion with them; the master did everything which could reasonably be expected of him to prevent the vessel from sinking. Accordingly, my opinion is against a new trial.

THOMPSON, J., VAN NESS, J., and YATES, J., concurred.

KENT, Ch. J. I concur in the general doctrine, that the sudden failure of the wind was an act of God. It was an event which could not happen by the intervention of man, nor be prevented by human prudence. But I think here was a degree of negligence, imputable to the master, in sailing so near the shore under a "light, variable wind," that a failure in coming about would cast him aground. He ought to have exercised more caution, and guarded against such a probable event, in that case, as the want of wind to bring his vessel about. A common carrier is only to be excused from a loss happening in spite of all human effort and sagacity. Trent Navigation *v.* Wood, 3 Esp. N. P. 127 [95]. A *casus fortuitus* was defined, in the civil law, to be *quod fato contingit, cavis diligentissima possit contingere*. But as this point does not appear to have been particularly urged at the trial, and the verdict negatives the charge of negligence; and as the responsibility of common carriers may be deemed sufficiently strict, I am content not to interfere with the verdict, though I think that the evidence would have warranted the conclusion of negligence to a certain extent.

Judgment for the defendant.

FRIEND, ETC. *v.* WOODS.

6 Gratt. (Va.) 189. 1849.

DANIEL, J. By the common law a carrier is treated as an insurer against all damage to, or loss of, goods intrusted to him for transportation, except such as may arise from the act of God, the act of the enemies of the country, or the act of the owner of the goods. In the case of Murphy, Brown & Co. *v.* Staton, 3 Munf. 239, it was decided by this Court that the owners of boats engaged in the upper navigation of James River were subject to this rule, and liable for losses arising from the dangers of that navigation. It was also further decided in that case that if a loss happens, the *onus* lies on the carrier to exempt himself from liability; and that his defence is not sustained by showing that the navigation is attended with so much danger that a loss may happen, notwithstanding the utmost efforts to prevent it, and that the person conducting the boat possessed competent skill, used due diligence, and provided hands of sufficient strength and experience to assist him.

The propriety of the decision it is believed has not been questioned. We have at least no report of any effort to disturb it. The case may therefore be regarded as settling that the liabilities of common carriers upon our navigable streams are fixed by the common-law rule, and that losses arising from the ordinary dangers of navigation, however great and however carefully guarded against, do not fall within the exception.

It is contended by the plaintiffs in error, that the evidence offered by them in the Court below tended to show that the loss sustained by the plaintiff was occasioned by such an extraordinary peril as negatived all legal inference of negligence on the part of the carrier, and made the loss referrible to the act of God; and that the instruction given by the Court at the instance of the plaintiff was erroneous and prejudicial to them.

It appears from the bill of exceptions, that the plaintiff, having proved that he delivered at the Kanawha Salines, in the county of Kanawha, on board of a steamboat in the charge of the defendants, who were the owners thereof, and common carriers, a quantity of salt, to be carried on the said boat to Nashville, in the State of Tennessee, for the transportation of which the defendants were to receive a stipulated freight per barrel; and that the said boat freighted with said salt proceeded on her voyage as far as to the confluence of the Elk River with the Kanawha, when she stranded, sprung a leak, and filled with water, whereby a portion of the salt was wholly lost, and the balance much damaged and impaired in value; and the defendants having then introduced evidence tending

to prove that the water in the river was in good navigable condition; that the boat was conducted through the ordinary channel for steamboat navigation; that some eight or ten days before the boat proceeded on her voyage there was a rise of Elk River, a tributary of the Kanawha, and the ice gorged at its mouth, and a bar of sand and gravel formed in the channel along which the boat had to pass, and that the officers and crew of the boat were ignorant of the formation of the bar when the boat stranded upon it, and that the officers and crew used their efforts to save the salt after the boat had so stranded; the plaintiff moved the Court to instruct the jury upon the law governing the case: Whereupon the Court instructed the jury that if they believed from the evidence that the boat was stranded by running upon a bar previously formed in the ordinary channel of the river, but that the existence of the bar might by human foresight and diligence have been ascertained and avoided, although the navigators or those in charge of the boat were ignorant of its existence at the time the boat ran upon it, the defendants were liable for the loss (if any) of the salt freighted by them on the boat occasioned by its stranding; although the jury might be satisfied that the defendants, after the boat stranded, used all the means within their power and control to preserve the freight on board the boat from being lost or injured.

Among the strongest authorities cited in behalf of the plaintiffs in error are the cases of Smyrl *v.* Niolon, 2 Bailey's R. 421, and Williams *v.* Grant, 1 Conn. R. 487. In the former it was held that a loss occasioned by a boat's running on an unknown "snag" in the usual channel of the river, is referrible to the act of God, and that the carrier will be excused; and in the latter it was said that striking upon a rock in the sea not generally known to navigators, and actually not known to the master of the ship, is the act of God. And other authorities go so far as to assert that if an obstruction be secretly sunk in the stream, and, not being known to the carrier, his boat founder, he would be excused. The last proposition stands condemned by the leading cases, both English and American. In the case of Forward *v.* Pittard, 1 T. R. 27 [97] Lord Mansfield says, that "to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such an accident as could not happen by the intervention of man, as storms, lightning, and tempests." The same doctrine is strongly stated in M'Arthur *v.* Sears, 21 Wend. R. 196, where it is said that "no matter what degree of prudence may be exercised by the carrier and his servants; although the delusion by which it is baffled, or the force by which it is overcome, be inevitable; yet if it be the result of human means, the carrier is responsible."

These cases clearly restrict the excuse of the carrier, for loss

occasioned by obstructions in the stream, to such obstructions as are wholly the result of natural causes. And the cases in which the carriers have been exonerated from losses occasioned by such obstructions as Smyrl *v.* Niolon, and Williams *v.* Grant, before mentioned, will, I think, upon examination, be found to be cases in which either the bills of lading contained the exception "of the perils of the river," or in which that exception has been confounded with the exception of the "act of God." In the case of M'Arthur *v.* Sears, a distinction between the two phrases is pointed out. It is shown that the exception "of dangers of perils of the sea or river," often contained in bills of lading, are of much broader compass than the words "act of God;" and the case of Gordon *v.* Buchanan, 5 Yerg. R. 71, is cited with approbation, in which it is said that "many of the disasters which would not come within the definition of the act of God would fall within the former exception; such, for instance, as losses occasioned by hidden obstructions in the river newly placed there, and of a character that human skill and foresight could not have discovered and avoided."

In a note to the case of Coggs *v.* Barnard, in the American edition of Smith's Leading Cases, 43 Law Lib. 180, the American decisions are collated and reviewed, and a definition is given to the expression "act of God," which expresses, I think, with precision, its true meaning. The true notion of the exception is there held to be "those losses that are occasioned exclusively by the *violence of nature;* by that kind of force of the elements which human ability could not have foreseen or prevented; such as lightning, tornadoes, sudden squalls of wind." "The principle that all human agency is to be excluded from creating or entering into the cause of mischief, in order that it may be deemed the act of God, shuts out those cases where the natural object in question made a cause of mischief, solely by the act of the captain in bringing his vessel into that particular position where alone the natural object could cause mischief: rocks, shoals, currents, etc., are not, by their own nature and inherently, agents of mischief and causes of danger, as tempests, lightning, etc., are."

The act of God which excuses the carrier must therefore, I think, be a direct and violent act of nature.

The rule, it is insisted, is a harsh one upon the carrier, and it is argued that the Court should be slow to extend it further than it is fully sustained by the cases. However harsh the rule may at first appear to be, it has been long established, and is well founded on maxims of public policy and convenience; and, viewing the carrier in the light of an insurer, it is of the utmost importance to him, as well as to the public who deal with him, that the acts for which he is to be excused should have a plain and well-defined meaning. When it is understood that no act is within the exception, except such a violent act of nature as implies the entire exclusion of all

human agency, the liabilities of the carrier are plainly marked out, and a standard is fixed by which the extent of the compensation to indemnify him for his risks can be readily measured and ascertained. The rule, too, when so understood, puts to rest many perplexing questions of fact, in the litigation of which the advantage is always on the side of the carrier. Under this rule the carrier is not permitted to go into proofs of care or diligence, and the owner of the goods is not required to adduce evidence of negligence till the loss in question is shown to be the immediate result of an extraordinary convulsion of nature, or of a direct visitation of the elements, against which the aids of science and skill are of no avail.

So understanding the law, I do not perceive how the defendants in error could have been prejudiced by the instruction complained of, and am of opinion to affirm the judgment.

Judgment affirmed.[1]

RAILROAD CO. *v.* REEVES.

10 Wall. 176. 1869.

In error to the Circuit Court for the Western District of Tennessee, the case being this:—

Reeves sued the Memphis and Charleston Railroad Company as a common carrier for damage to a quantity of tobacco received by it for carriage, the allegation being negligence and want of due care. The tobacco came by rail from Salisbury, North Carolina, to Chattanooga, Tennessee, reaching the latter place on *the 5th of March*, 1867. At Chattanooga it was received by the Memphis and Charleston Railroad Company on the 5th of March, and reloaded into two of its cars, about five o'clock in the afternoon.

The Memphis and Charleston Railroad track extends from

[1] In Gordon *v.* Little, 8 Serg. & Rawle, 533, it was held that a general usage, adjusting the responsibility of carriers on the western waters, was admissible in their defence. This was the case of a keel-boat sailing from Pittsburg, in Pennsylvania, to Hopkinsville, Kentucky. But no offer of that kind was made in the case at bar; and it may be very questionable, since the late cases in this court denying all restriction even by notice, whether such a custom, which must arise from the management of carriers, would be sustainable in true policy, owing to the opening which it gives for fraud and collusion, etc. In Aymar *v.* Astor, before cited, and The Schooner Reeside, 2 Sumn. 567, 573, a general commercial custom enlarging the phrase "perils on dangers of the seas," in a bill of lading, so as to comprehend causes of loss beyond their legal import, was denied. Mr. Justice Story, in the last case, very properly expresses a general dissatisfaction to the reception of such proof to cases where it has not heretofore been applied. He finally rejected it, because it worked a contradiction of the written agreement. Turney *v.* Wilson, 7 Yerg. 340, S. P. But see Cherry *v.* Holly, 14 Wendell, 26, and Barber *v.* Brace, 3 Conn. R. 9. Also Lawrence *v.* M'Gregor, 1 Wright, 193. Per Cowen, J., in McArthur *v.* Sears, 21 Wend. 190.

Memphis to Stevenson, Alabama, a point west of Chattanooga, on the Nashville and Chattanooga Railroad. Between Chattanooga and Stevenson, by a contract between the two companies, the trains of the Memphis and Charleston road were drawn by engines belonging to the last-named road, an agent of the road being at Chattanooga and receiving freight and passengers there for Memphis.

One Price, who as agent of Reeves was attending and looking after the tobacco along the route, testified (though his testimony on this point was contradicted) that the agent of the company at Chattanooga promised that, if the bills were brought over in time, the tobacco should go forward at six o'clock that evening; and shortly before that time informed him that the bills had come over, and assured him that the tobacco would go off at that hour. It did not do so, though he, Price, the agent, supposing that it would, went on by a passenger train and so could no longer look after the tobacco. By the time-tables which governed at the time the forwarding of freight, goods received during one day were forwarded the next morning at 5.45 A.M., and at that time the train on which the tobacco in question was placed went off. This train, however, found the road obstructed by rocks that had fallen during the night and had to return, and, in consequence of information of the washing away of a bridge on the road, had to remain at Chattanooga. Chattanooga is built on low ground, on the Tennessee River, which, a short distance west of it, runs along the base of Lookout Mountain. On the 5th of March there had been heavy rains for some weeks, and the river had been rising and was very high. Freshets of the years 1826 and 1847, the highest ever remembered previous to one now to be spoken of, or of which there was any tradition, had not risen by within three feet as high as the level of the railroad track in the station where the cars containing the tobacco were placed, on their coming back to Chattanooga, after their unsuccessful attempt to go forward.

The river rose gradually *until the evening of the 7th (Thursday)*, at which time it reached the high-water mark of 1847. That night it rose an average of four inches an hour from 7 P. M. to 6.30 A. M. of the 8th of March, and it continued to rise until about 2 P. M., of Sunday, the 10th of March. On Friday, at 1 P. M., the engines standing on the tracks were submerged so that their lower fire-boxes were covered. On Saturday, at 8 P. M., the engines and cars were submerged ten feet or more, and the freight in question was thus damaged. *Had it gone off on the evening of the 5th it would not have been damaged.* A freight train did leave Chattanooga going towards Memphis on that evening, but it carried freight of the Nashville and Chattanooga road only, and none for the road of the defendant. Four or five days elapsed from the time when the water began to come up into the town, before it was so high as to submerge the cars and injure the freight. No one expected the

water would rise as it did, because it rose full fifteen feet higher than had ever before been known. The rise was at first gradual, and from the direction of Lookout Mountain, by backing; but afterwards it came suddenly from the direction of the Western and Atlantic road, opposite to its former direction, and then rose very rapidly. Although on the 6th the river was getting out of its banks, there was no apprehension, up to the night of the 7th, that the water would submerge the town. During the night of the 7th merchants removed their goods, and one Phillips, who that night removed his to the second story of a building standing on ground no higher than the depot, saved them. The water rose into his building on the morning of the 8th. *The people finally fled to the hills, and there was a universal destruction of property as well of individuals as of railroads passing through the city.* The waters indeed were so high and the flood finally so unexpected that the mayor broke open railroad cars and took provisions which were in process of transportation, to feed the famishing population. The cars in which the tobacco was, were standing on the highest ground in the region of the station. There were roads in other directions, beside the road over which the rock had fallen, physically traversable by the cars which had the tobacco; but there were difficulties of various kinds in going on them, which the agents considered amounted to a bar to try to use them.

Mr. Justice MILLER. . . . . .

We are of opinion, then, that both the refusal to charge as requested and the charge actually given are properly before us for examination. As regards the first, we will only notice one of the rejected instructions, the fourth. It was prayed in these words: —

"When the damage is shown to have resulted from the immediate act of God, such as a sudden and extraordinary flood, the carrier would be exempt from liability, unless the plaintiff shall prove that the defendant was guilty of some negligence in not providing for the safety of the goods. That he could do so must be proven by the plaintiff, or must appear in the facts of the case."

It is hard to see how the soundness of this proposition can be made clearer than by its bare statement. A common carrier assumes all risks except those caused by the act of God and the public enemy. One of the instances always mentioned by the elementary writers of loss by the act of God is the case of loss by flood and storm. Now, when it is shown that the damage resulted from this cause immediately, he is excused.

What is to make him liable after this? No question of his negligence arises unless it is made by the other party. It is not necessary for him to prove that the cause was such as releases him, and then to prove affirmatively that he did not contribute to it. If, after he has excused himself by showing the presence of the over-

powering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it.

The testimony in the case, wholly uncontradicted, shows one of the most sudden, violent, and extraordinary floods ever known in that part of the country. The tobacco was being transported from Salisbury, North Carolina, to Memphis, on a contract through and by several railroad companies, of which defendant was one. At Chattanooga it was received by defendant, and fifteen miles out the train was arrested, blocked by a land-slide and broken bridges, and returned to Chattanooga, when the water came over the track into the car and injured the tobacco.

The second instruction given by the court says that if, while the cars were so standing at Chattanooga, they were submerged by a freshet which no human care, skill, and prudence could have avoided, then the defendant would not be liable; but if the cars were brought within the influence of the freshet by the act of defendant, and if the defendant or his agent had not so acted, the loss would not have occurred, then it was not the act of God, and defendant would be liable. The fifth instruction given also tells the jury that if the damage could have been prevented by any means within the power of the defendant or his agents, and such means were not resorted to, then the jury must find for the plaintiff.

In contrast with the stringent ruling here stated, and as expressive of our view of the law on this point, we cite two decisions by courts of the first respectability in this country.

In Morrison *v.* Davis & Co., 20 Pennsylvania State, 171, goods being transported on a canal were injured by the wrecking of the boat, caused by an extraordinary flood. It was shown that a lame horse used by defendants delayed the boat, which would otherwise have passed the place where the accident occurred in time to avoid the injury. The court held that the proximate cause of the disaster was the flood, and the delay caused by the lame horse the remote cause, and that the maxim, *causa proxima, non remota spectatur*, applied as well to contracts of common carriers as to others. The court further held, that when carriers discover themselves in peril by inevitable accident, the law requires of them ordinary care, skill, and foresight, which it defines to be the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them.

In Denny *v.* New York Central Railroad Co., 13 Gray, 481, the defendants were guilty of a negligent delay of six days in transporting wool from Suspension Bridge to Albany, and while in their depot at the latter place a few days after, it was submerged by a sudden and violent flood in the Hudson River. The court says that the flood was the proximate cause of the injury, and the delay in transportation the remote one; that the doctrine we have just stated

governs the liabilities of common carriers as it does other occupations and pursuits, and it cites with approval the case of Morrison *v.* Davis & Co.

Of the soundness of this principle we are entirely convinced, and it is at variance with the general groundwork of the court's charge in this case.

As the case must go back for a new trial, there is another error which we must notice, as it might otherwise be repeated. It is the third instruction given by the court, to the effect that if the defendant had contracted to start with the tobacco the evening before, and the jury believe if he had done so the train would have escaped injury, then the defendant was liable. Even if there had been such a contract, the failure to comply would have been only the remote cause of the loss.

But all the testimony that was given is in the record, and we see nothing from which the jury could have inferred any such contract, or which tends to establish it, and for that reason no such instruction should have been given.

Judgment reversed and a new trial ordered.[1]

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b. *Act of Public Enemy.*

MORSE *v.* SLUE.

'King's Bench. 1 Vent. 238. 1672.

The case was argued two several terms at the bar, by Mr. Holt for the plaintiff, and Sir Francis Winnington for the defendant, and Mr. Molloy for the plaintiff, and Mr. Wallop for the defendant; and by the opinion of the whole Court, judgment was given this term for the plaintiff.

Hale delivered the reasons as followeth.

First, by the Admiral Civil Law the master is not chargeable *pro damno fatali*, as in case of pirates, storm, etc., but where there is any negligence in him he is.

Secondly, This case is not to be measured by the rules of the Admiral Law, because the ship was *infra corpus comitatus*.

Then the first reason wherefore the master is liable is, because he takes a reward; and the usage is, that half wages is paid him before he goes out of the country.

Secondly, If the master would, he might have made a caution for himself, which he omitting and taking in the goods generally,

[1] Acc., Fay *v.* Boston &c. R. Co., 148 Mass. 220. *Contra*, Condict *v.* Grand Trunk R. Co., 54 N. Y. 500.

he shall answer for what happens. There was a case (not long since) when one brought a box to a carrier, in which there was a great sum of money, and the carrier demanded of the owner what was in it; who answered, that it was filled with silks and such like goods of mean value; upon which the carrier took it, and was robbed. And resolved that he was liable. But if the carrier had told the owner that it was a dangerous time, and if there were money in it, he durst not take charge of it; and the owner had answered as before, this matter would have excused the carrier.

Thirdly, He which would take off the master in this case from the action must assign a difference between it and the case of a hoyman, common carrier or innholder.

'T is objected, That the master is but a servant to the owners.

Answer, The law takes notice of him as no more than a servant. 'T is known, that he may impawn the ship if occasion be, and sell *bona peritura;* he is rather an officer than a servant. In an escape the jailer may be charged, though the sheriff is also liable, for *respondeat superior*. But the turnkey cannot be sued, for he is but a mere servant: by the civil law the master or owner is chargeable at the election of the merchant.

'T is further objected, That he receives wages from the owners.

Answer, In effect the merchant pays him, for he pays the owners freight, so that 't is but handed over by them to the master; if the freight be lost, the wages are lost too, for the rule is freight, is the mother of wages: therefore, though the declaration is, that the master received wages of the merchant, and the verdict is, that the owners pay it, 't is no material variance.

Objection, 'T is found, that there were the usual number of men to guard the ship?

Answer, True, for the ship, but not with reference to the goods, for the number ought to be more or less as the port is dangerous, and the goods of value, 33 H. 6, 1. If rebels break a jail, so that the prisoner escape, the jailer is liable; but is otherwise of enemies; so the master is not chargeable where the ship is spoiled by pirates. And if a carrier be robbed by a hundred men, he is never the more excused. Ante.

SOUTHERN EXPRESS CO. *v.* WOMACK.

1 Heisk. (Tenn.), 256. 1870.

R. McFarland, S. J., delivered the opinion of the Court.

This is an action brought by defendant in error against the plaintiff in error as a common carrier, for failing to carry and deliver a quantity of household goods, notes, bonds, checks, etc., according

to contract, from Prospect Depot, in Virginia, to Bristol, Tennessee; and in another count for failing to deliver said goods at Lynchburg, Virginia.

The plaintiff recovered in the Court below, and a new trial being refused the defendant, an appeal in error has been presented to this Court.

A number of pleas were filed. Upon some of these there was issue, and to others a demurrer was sustained. We do not deem it necessary to consider the questions raised by these pleadings, for in our opinion, all the defences therein indicated, so far as they are good in law, might have been made under the first plea, which is *non assumpsit*. We will, therefore, proceed to inquire whether the plaintiff in error had the full benefit of all the defences to which he was entitled under the general issue.

The proof tends to show the following state of facts: The plaintiff in error was a common carrier, in the full, legal sense of the term, from Richmond, in Virginia, to Bristol, Tennessee, by way of Lynchburg. Their mode of transportation was by railway. Prospect Depot was a way station between Richmond and Lynchburg. About the middle of March, 1865, the boxes containing the goods in question were delivered to R. V. Davis, the agent of the Company at Prospect Depot, for transportation to Bristol, the boxes being properly marked. Davies gave Mrs. Womack, the wife of the defendant in error, a receipt simply acknowledging the receipt of the goods for transportation, and received from her the amount of charges for transporting the goods to Lynchburg, in Confederate money, he not being authorized to collect the charges any further.

The proof further shows that the railway trains upon which the plaintiffs in error carried freights, continued to pass daily in the direction of Lynchburg, with, perhaps, some occasional interruption, until near the 7th of April. That, for the first four days after the goods were received, Davis carried them to the track of the railroad, as the train passed, and tendered them to the "messenger," as he is called, who was the agent of the company, and whose duty it was to receive the goods upon the train, and forward them. That the messenger declined to take the goods on, alleging that he had no room for them, but would try to take them next day. After this, Davis continued each day for some weeks to apply to the messenger to take the goods, but was "put off" from day to day, with substantially the same reply. That towards the 7th of April, one Thomas Apee, who had hauled the goods to the depot, and who was the friend of the defendant in error, finding that the goods were still in the depot, and that hostile armies were approaching, proposed to Davis to take charge of the goods, and haul them away, and take care of them, but this proposal was refused by Davis. On the 7th of April the depot was captured by the United States forces, and

the goods captured or destroyed, except a small quantity that were afterwards recovered by the defendants in error.

The proof for the plaintiff in error shows that, at the time the goods were received, Prospect Depot was inside the military lines of the Confederate forces, and so remained until the 7th of April. That the line of railroad referred to was not owned by them, but that they hired from the railroad company a car which they used on each trip for the transportation of their freight. The proof further shows that between the 16th of March and the 17th of April, large quantities of freight were sent from Richmond and other points in the direction of Lynchburg; that the Confederate military forces had the preference upon the road, and on some occasions the "Express car" was taken from the plaintiff in error, for the use of the military, and the proof renders it probable that the express cars, during the period, were loaded to their capacity, when going in the direction of Lynchburg, before they reached Prospect Depot.

It was further proven by the plaintiff in error, that they generally used a printed form of receipt which they gave when goods were delivered to them, but at the time of this transaction, the agent, Davis, had none of these blanks on hand.

It was also proved by them, that when Mrs. Womack was asked what the boxes contained, she replied that they contained "beds, bed-clothing, wearing apparel," etc., but did not disclose that they contained bonds, notes, or anything of that character, the question being pressed upon her no further.

Upon this, various questions are made and argued as to the action of the Court below.

. . . . . .

4. Are the United States troops, who, it is alleged, destroyed these goods, to be regarded as "the public enemies," or "the enemies of the country," in the sense of the law, so as to excuse the plaintiff in error for the loss of the goods caused by these acts, without fault on the part of the agents of the company? His Honor, the Circuit Judge, decided this proposition in the negative, and said: "The United States army or troops were not enemies to the Government, or public enemies; they were public friends and friends to the Government; there was but one Government in the United States, and that was the United States Government." Consequently the United States troops, under General Stoneman, a United States General, and commanding for the United States, were not the enemies of the United States Government. His Honor further told the jury "that the Confederate States never were recognized by any Government as a Government *de jure* or *de facto*. Our Supreme Court recognized them as belligerents so as to regulate criminal intent in robbery and some other felonies, but no further. The army of the so-called Confederate States was an unlawful combination, nothing but a mob, however huge its proportions may

have been; consequently if the goods were destroyed by the United States troops, that would not exonerate the company."

We are of opinion that the definition, as above given by his Honor, of the character of the late war, and as to the status of the Confederate Government, is not correct or accurate; but the only question of practical importance, is, was he correct in holding that the United States troops were not to be regarded as the public enemy, against whose acts the plaintiff in error did not insure. If he was in error in this, it was an error affecting the merits, and a new trial should be granted. If, on the other hand, he answered this question correctly, then the error which followed in giving a definition of the character of the rebellion — a definition which was unnecessary — was immaterial, and could not have prejudiced the plaintiff in error. The term "public enemy," or the "enemy of the country, has, in general, a technical legal meaning. It is understood to apply to foreign nations, with whom there is open war, and to pirates, who are considered at war with all mankind; but it does not include robbers, thieves, or rioters or insurgents, whatever be their violence." Story on Contr., 752.

In England, the term "public enemies," or "the king's enemies," as applied to the law of treason, has been held not to apply to insurgents or rebels, they not being enemies. Hawkins' Pleas of the Crown, 55.

It has been held by the Supreme Court of the United States, in a number of cases known as the Prize Cases, that the late rebellion was "a war" in the legal sense, as contra-distinguished from a mere insurrection, and that as a consequence of this in the conduct of the war during its pendency, the persons living upon either side of the line dividing the contending forces were to be regarded as enemies of the other, to the extent to authorize the forfeiture of the property of either captured by the other upon the high seas.

In the case of Thorington *v.* Smith, 9 Wallace, 1, Chief Justice Chase classes the Confederate Government among that class of cases where a foreign government, at war with our own, for instance, obtains temporary possession of a portion of our country, and establishes their authority over it, and enforces the same by military power; and, referring to the Confederate Government, says: "Belligerent rights were conceded to it, and thereafter its territory held to be enemy's territory, and, for most purposes, its inhabitants held to be enemies."

It is clear that, during the war, the parties upon each side treated each other as enemies, and this was justified by the laws and usages of war.

As an abstract proposition, it cannot be doubted that the United States Government was the rightful government, and that the war was rightfully prosecuted for the enforcement of its laws; and the attempted revolution being unsuccessful, no portion of the citizens

were at any time released from their allegiance to the rightful government, however they may be excused or justified in rendering obedience to the usurped government, in civil matters, so long as this obedience might have been enforced by actual military power; and we are not to be understood as announcing the proposition that, in reality, the United States Government or troops were the public enemy of its own citizens during the progress of the war.

But in construing this contract, and determining the rights and liabilities of the parties themselves, we must give to the term "public enemy," or "enemy of the country," the meaning that attached to it at the time and place the contract was made. We have seen that at the date of this transaction both parties resided within the military lines of the "Confederate States." We have also seen that at that time, "for most purposes," the people upon each side of the dividing line were treated as the enemies of the other. So that the term "public enemy," or "enemy of the country," as understood and applied by the contracting parties at the time, included the troops of the United States Government, and that the plaintiffs in error are not, under the circumstances, to be held as insurers against loss that might occur by the act of the United States troops.

Such was not the legal import of the contract they made, or its meaning as they then understood it.

It follows, therefore, that while in one sense the proposition of his Honor was correct, it was not the proper instruction applicable to the facts of the case. For this error alone we reverse the judgment, and remand the cause for a new trial.

There is evidence in the record, upon which the plaintiff in error might well have been held liable for their failure to carry the goods or return them before the time they are alleged to have been destroyed by the United States troops; but as this was a question of fact, they were entitled to have the case submitted to the jury upon a correct charge. *Reverse the judgment.*

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c. *Act of Shipper.*

CONGAR *v.* CHICAGO, ETC. R. CO.

24 Wis. 154. 1869.

THE plaintiffs shipped, by defendant's road, trees and other nursery stock from Whitewater, in this State, directed to "Iuka, Iowa," the consignees being resident in a village of that name in Tama County, Iowa. At Chicago, the goods were shipped by defendant's agents, by the Chicago, Burlington & Quincy Railroad Com-

pany, and at Quincy were transferred to the Quincy & Missouri Railway, by which they were transported to Iuka, in Keokuk County, Iowa. In consequence of this mistake, they are alleged to have become worthless, and this action was brought to recover damages. Certain averments of the complaint and answer will be found recited in the second paragraph of the opinion, *infra*. A demurrer to the answer was sustained, and defendant appealed.

Dixon, Ch. J. The decision of the court below, as shown by the written opinion of the learned judge found in the printed case, turned upon the point that, for the purpose of charging the company with negligence in shipping the goods over the wrong road, notice to any of its agents was notice to the company. In other words, the court held, that the knowledge of the agents residing in the State of Iowa, and transacting the business of the company there, of a place in that State named Iuka, and that goods destined for that place were to be deposited at the nearest station on the line of the company's road, called Toledo, was the knowledge of the company, so as to make the company responsible for any injury resulting from the mistake of its agents residing and transacting its business at the city of Chicago, in the State of Illinois, in forwarding the goods from the latter place by another railroad, instead of over the company's own road, although such mistake occurred without any negligence whatever on the part of the agents making it, but after they had taken reasonable and proper care to ascertain the route by which the goods should be forwarded, and had forwarded them in accordance with the information so obtained. This, we think, was an erroneous application of the doctrine that notice to the agent is notice to the principal. Such notice, to be binding upon the principal, must be notice to the agent when acting within the scope of his agency, and must relate to the business, or, as most of the authorities have it, the *very* business, in which he is engaged, or is represented as being engaged, by authority of his principal. It must be the knowledge of the agent coming to him while he is concerned for the principal, and in the course of the very transaction which is the subject of the suit, or so near before it that the agent must be presumed to recollect it. Story on Agency, § 140, and 2 Kent's Com. 630, and *note*, and cases cited. Notice, therefore, to the agents in Iowa, distant some two or three hundred miles from the city of Chicago, who have distinct duties to perform, and were not at all concerned in the business of forwarding the goods from Chicago, was not such notice as will bind the company in relation to that business, the same having been transacted by other agents, who had no such notice. This seems very clear when we consider the reason and ground upon which this doctrine of constructive notice rests. The principal is chargeable with the knowledge of his agent, because the agent is substituted in his place, and represents him in the particular transaction; and it would seem to be an

obvious perversion of the doctrine, and to lead to most injurious results, if, in the same transaction, the principal were likewise to be charged with the knowledge of other agents, not engaged in it, and to whom he had delegated no authority with respect to it, but who were employed by him in other and wholly different departments of his business.

The complaint charges that the place called Iuka, in Tama County, Iowa, to which the goods were intended to be sent, was known to the agents of the company residing and doing business along the line of its road in the State of Iowa, and that the station where such goods were to be deposited was Toledo. The answer alleges that the same place was unknown to the officers and agents of the company at Chicago; that they were informed that said Iuka was situated in Keokuk County, in the State of Iowa, and near the line of the Burlington & Missouri Railroad; that they examined a map of Iowa used by shippers, and kept in the office of defendant, for the purpose of ascertaining where said Iuka was situated; and that said map represented said Iuka as being in Keokuk County aforesaid. The answer further alleges that the goods were directed to "C. E. Cox, Iuka, Iowa," without giving the name of the county, or other directions to indicate to what part of the State, or to what railroad station in the State, the same were consigned, or by what line of railroad the same were to be forwarded. It appears to this court, therefore, upon the pleadings that no cause of action for negligence is stated against the company, but that, if there was negligence on the part of any one, it was upon the part of the plaintiff in not having marked the goods with the name of the county, or otherwise with that of the railway station, or with the line of road by which they were to be sent. The demurrer to the answer should, therefore, have been overruled; and the order sustaining it must be reversed, and the cause remanded for further proceedings, according to law.

MILTIMORE *v.* CHICAGO, ETC. R. CO.

37 Wis. 190. 1875.

ACTION for damages alleged to have been caused by the negligence of the defendant company in transporting a wagon for the plaintiffs, on its cars from Janesville to Chicago. The answer denied negligence, and alleged a special contract that the wagon should be transported wholly at the owners' risk in respect to the cause from which the damage resulted.

The evidence showed the facts to be, that the plaintiffs, by one Ripley, their agent, applied for transportation of the wagon in an open or platform car, as they desired it shipped without taking it

apart; that the price was agreed upon, and the company agreed that it should be sent on the train which was to leave the same evening at 9.15 o'clock, provided it was received in time, and that, if there was a flat car in the yard, it should be placed where he could run it on; that Ripley applied to the employee of the company, whose duty was to make up trains, for a car, who informed him that they would have a car placed for him, and, if he got the wagon there before 5 o'clock, they would help him load the wagon upon the car; that he took the wagon up to be loaded a little after 5 o'clock. The employees of the plaintiff loaded it upon the car. Two of the employees of the company went back, at Ripley's request, after hours, and helped load it; and one suggested that he take off the wheels, but Ripley said he could fasten them so they would not roll, and tied the wheels, and nailed down blocks upon the floor to keep it from rolling. The company gave a receipt for the wagon which contained the agreement that the company should not be "responsible for loss or damage to any . . . article whose bulk rendered it necessary to transport in open cars, . . . unless it can be shown that such damage or loss occurred through negligence or default of the agents of the company." The train, with the car containing the wagon, left for Chicago that evening while a high wind was prevailing. The wagon, being in the condition in which the plaintiff's agent had left it, was blown off from the car in transit, and injured.

The issue was tried by the court, who found that the defendant was negligent in removing the wagon, during the prevalence of the high wind, without taking precaution to secure it to the car, so as to prevent it from being blown off; and that by reason of such negligence the injury occurred. From judgment on the finding the defendant appealed.

COLE, J. The learned circuit judge found from the evidence that the defendant company was guilty of negligence in removing the wagon from Janesville, the place of shipment, and in carrying it forward toward Chicago, its point of destination, without taking the precaution to secure it to the car, so as to prevent it from being thrown from the car by the violence of the wind prevailing at the time. Upon this ground the company was held liable for the injury to the wagon upon being blown off the car.

We feel constrained to dissent from this view of the case. The evidence shows, beyond all doubt or question, that the plaintiffs themselves chose an open or platform car upon which to transport the wagon to Chicago. They did not wish to have the wagon taken apart so that it could be transported in a box car, but chose the platform car, upon which the wagon could be carried standing, as the cheaper mode of conveyance. The company certainly was not at fault for this manner of transporting the wagon. The evidence clearly shows that the plaintiffs assumed the labor and responsibility of loading the wagon. Ripley was told when he bargained for the

car, by the agents of the company, that if he got the wagon to the cars before five o'clock, they would help him load it, but if he got there after that time, he would find his car by the freight-house platform, upon which to place the wagon. He got to the freight depot late, but met a couple of the workmen coming away, who went back and aided him in loading the wagon. But Ripley himself took the entire charge and responsibility of loading the wagon, as it was understood he would do, and of securing it to the car. Whatever means and appliances he deemed necessary and proper to be used to secure the property while in transit, he used, or might have used, without the control or interference of any one. The state of the weather, the nature of the property, its exposure to violent winds, he should have considered and provided for. It seems to us there is no reason for saying that the company was guilty of negligence, and did not take due precautions to secure the wagon, in view of the established fact that the plaintiffs undertook to attend to these matters themselves. The company received the property for transportation, loaded and secured as the plaintiffs saw fit to load and secure it; and why should negligence be imputed to it for not taking precautions to guard against the plaintiffs' want of care? It is said the company was exceedingly careless and negligent in attempting to carry this covered wagon at the time and in the manner it did, without making any effort to attach the same more firmly to the car. But the obvious answer to this argument is, that the plaintiffs themselves assumed the risk and responsibility of loading and securing the wagon, and the company was not called upon to see that they had properly performed their duty in that regard. The plaintiffs had ordered that the wagon should be sent by the night train, and the agents of the company had agreed to take it, if loaded. According to the testimony of Carter, one of the plaintiffs, the wind blew very hard between eight and nine, while the train on which the wagon was to go did not leave Janesville until 9.15. There was ample time to countermand the order to ship the wagon that night, or to see that it was so secured that it could not be blown from the car by the violence of the wind. It seems to us that whatever negligence there was in securing the wagon must be imputed to the plaintiffs. The case is not distinguishable in principle from Betts *v.* The Farmers' Loan & Trust Company, 21 Wis. 81, and the decision there made is controlling here. There the owner of cattle shipped by railroad, who had undertaken to put them in the car, knew that the door of the car was in an unsafe condition, but neglected to inform the station agent, who was ignorant of the fact; and it was held that he could not recover for injuries received by the cattle in escaping from the car in consequence of such defect. So, under the circumstances of this case, it seems to us, the company was not obliged to take further precautions to fasten or secure the wagon on the car. The plaintiffs had

taken upon themselves that care and responsibility, and if they failed properly to secure it against the violence of the wind, and it was injured, the loss is attributable to their fault.

It follows from these views that the judgment of the Circuit Court must be reversed, and the case remanded with directions to dismiss the complaint.

WHITE *v.* WINNISIMMET CO.

7 Cush. (Mass.) 155. 1851.

This was an action on the case against the proprietors of a ferry for an injury to the plaintiff's property, occasioned by his horse and loaded wagon falling overboard from one of the defendants' boats, while passing from Boston to Chelsea.

Dewey, J. To a certain extent, persons keeping and maintaining a ferry are common carriers, and subject to the liabilities attaching to common carriers. It would be so, if a bale of goods or an article of merchandise was delivered by the owner to the agent of a ferry company, to be carried from one place to another for hire. Upon receiving such goods for transportation, the ferry company stipulate to carry them safely, and subject themselves to strict liability for the safe carriage and delivery of such goods; being only exempted for losses occasioned by those acts, which are denominated "acts of God, or of a public enemy." The principle above stated would embrace the case of a horse and wagon received by a ferryman to be transported by him on a ferry-boat, the ferryman accepting the exclusive custody of the same for such purpose, and the owner having, for the time being, surrendered the possession to the ferryman.

But the traveller uses the ferry-boat as he would a toll bridge, personally driving his horse upon the boat, selecting his position on the same, and himself remaining on the boat; neither putting his horse into the care and custody of the ferryman, nor signifying to him or his servants any wish or purpose to do so; and the only possession and custody, by the ferryman, of the horse and vehicle to which he is attached, is that which necessarily results from the traveller's driving his horse and wagon, or other vehicle, on board the boat, and paying the ordinary toll for a passage: in such case, the ferry company would not be chargeable with the full liabilities of common carriers of merchandise. The liability in this case would be one of a different character; and if the proprietors of the ferry were chargeable for loss or damage to the property, it would be upon different principles. In reference to persons thus using the ferry, the company have responsible duties to perform; the neglect of which may charge them for the loss of goods and property placed

on board their boat, when the loss has been occasioned by their default. It is the duty of a ferry company to provide a good and safe boat, suitable for the business in which they are engaged; and they are required to have all suitable and requisite accommodations for the entry upon, and safe transportation while on board, and the departure from the boat, of all horses and vehicles passing over such ferry. They are required to be provided with all proper and necessary servants and agents requisite for the safe and proper conducting of the business of the ferry, and with all proper and suitable guards and barriers on the boat, for the security of the property thus carried on the boat, and to prevent damage from such casualties as it would naturally be exposed to, though there was ordinary care on the part of the traveller. For neglect of duty in these respects they may be charged, but the liability is different from that of common carriers. The case of such a traveller, though not entirely similar, much more resembles that of a traveller upon a toll bridge or turnpike road; who, while he uses the easement of another, yet retains the possession and custody of his horse and wagon. The party, thus driving his own horse upon the boat, and retaining the custody of him, is bound, like the traveller on the toll bridge or the turnpike road, to use ordinary care and oversight in respect to his horse while on the boat, and if he does not use such ordinary care and oversight in respect to him, and for want thereof the horse leaps overboard, or receives on the boat some injury, all which might and would have been avoided, if the party had used proper care and diligence, such party must himself bear the loss which has thus been occasioned by his own neglect.

In deciding upon the nature and extent of the liability of ferrymen, and how far they are to be charged as common carriers, regard is to be had to the nature of the employment, and especially to the thing to be transported. This principle is practically applied in the well-known distinction relating to the liability of the proprietors of stagecoaches and other vehicles, as to the carriage of persons. No person thus carried in a public vehicle can recover damages for an injury to his person, if his own want of ordinary care contributed to the injury. Such carriers are not common carriers, with all the liabilities as such. One reason for the distinction is, that persons thus carried are not and cannot be placed under the same custody and control as bales of goods. Being intelligent beings, and having the power of locomotion, and having the opportunity on the one hand by their own voluntary acts, of exposing themselves to greater hazard, and on the other of guarding to some extent against perils, the law properly requires a person thus carried to exercise ordinary care and vigilance to avoid exposure to danger; and if this is not exercised, and an injury is sustained, the carrier is not liable therefor.

The same principle is also further illustrated in the various

decisions of the courts, in cases of actions instituted for the purpose of charging the carriers of slaves as common carriers of merchandise. It was successfully, and certainly most properly contended, as to the carriage of slaves, that in those States where slavery is allowed by law, and where slaves are to some purposes treated as chattels, yet as they are human beings, and cannot and ought not to be stored away and confined like bales of goods, and placed under the absolute control of the carrier, the principle of the common law applicable to common carriers of merchandise could not be applied to the carriers of slaves. This was so held in Boyce *v.* Anderson, 2 Pet. 150; Clark *v.* McDonald, 4 McCord, 223.

As having some bearing also on this question, we may allude to the modification of the principle of general liability as common carriers, in those cases where the owner of goods accompanies them in their transit, retaining a certain control over them, as in Brind *v.* Dale, 8 Car. & P. 207, where it was held, that if the owner of goods accompanies them to take care of them, and is himself guilty of negligence, he is not entitled to recover. This case also affirms, as a rule of law, a principle often found elsewhere, and which bears directly, as we think, upon the case before us, "that a party cannot recover, if his own negligence was as much the cause of the loss as that of the defendant."

Thus we perceive that a modification of the liability attached to common carriers occurs, as the nature of the thing to be carried, and the extent of the custody and control over it, by the carrier, varies. We think that the propriety of such a modification of what is certainly a very stringent rule of liability, in reference to cases where the entire custody and control of the property is not with the carrier, is quite obvious.

The case of a traveller conveyed by means of a ferry-boat, where the traveller enters upon the boat driving his horse attached to a wagon, or other vehicle, selecting his own place upon the boat, and continuing to retain under his own custody his horse and wagon, neither committing it to the care of the ferryman or his servants, or signifying any wish or purpose so to do, presents another instance where the liability of the carrier must be considered as of a restricted character; and, as in the case of a carrier of persons, duties devolve upon the traveller, and he is bound to use ordinary care and diligence in respect to his horse and vehicle, in order to prevent, as far as he can, by such care, any injury occurring from fright, or from other cause immediately resulting from the movements of the horse. When such horse or other animal is not surrendered into the custody of the ferryman, the driver is bound to do all that can be effected by reasonable diligence and supervision, to prevent a loss of his property occasioned by his horse becoming restless or affrighted. If the traveller wholly neglects his duty in this respect, leaving his horse without any oversight, and the horse, without the fault of the ferry-

man, becomes affrighted and throws himself and the vehicle to which he is attached overboard, when, by proper care and attention of the driver, this casualty would in all reasonable probability have been avoided, the loss must fall upon the traveller.

This case is to be decided by the application of these principles to the agreed facts stated by the parties.

These, briefly stated, are as follows: The defendants keep and maintain a ferry between Boston and Chelsea, and the plaintiff, travelling with his horse and wagon loaded with merchandise, drove the horse and wagon upon the ferry-boat of the defendants, paying the usual toll for his horse and wagon. The plaintiff did not occupy the place assigned him by the agent, but selected his own position; no further objection being made after he had taken it. He did not commit the charge of the horse and wagon to the particular custody of the servant of the defendants, or express any wish or purpose to do so. The horse had not been accustomed to pass over upon this ferry-boat. The plaintiff remained on board the boat, but left his horse and was at some distance from him with no one to have an oversight over him, or to restrain him, if frightened. In this state of things, the horse became frightened at the ringing of the bell, as the boat approached the shore, and sprang forward, struck the chain thrown across the forward end of the boat, with such force as to cause the hook connected with it to give way, and thereupon the horse and wagon went overboard. The horse was drowned, and the merchandise in the wagon greatly injured.

The facts, as stated, also show that the iron hook, by which the chain was fastened, was defective and insufficient in strength for the purposes it was designed to answer; though the defendants and their agent had no knowledge of that fact. This defect was one for which the defendants were answerable, and which, under other circumstances, might have charged them with the loss. But, unfortunately for the plaintiff, the facts also show a want of ordinary care and diligence on his part, in the oversight and care of his horse, and that, by want of such care and oversight, this loss was in all probability occasioned.

Every person is bound to use reasonable care to prevent damage to his property, and if the injury is attributable to himself in part, he cannot recover, although there may have been negligence on the part of the other party also. This doctrine is fully sustained by the case of Smith *v.* Smith, 2 Pick. 621, and by 2 Greenl. on Ev. §§ 220, 473, and cases there cited. The court are of opinion that, upon this ground, there must be

Judgment for the defendants.

HART *v.* CHICAGO, ETC. R. CO.

69 Iowa, 485. 1886.

On the eighteenth day of April, 1883, plaintiff delivered to defendant, at the city of Des Moines, one car-load of property, which the latter undertook to transport to the town of Miller, in Dakota Territory. The property shipped in the car consisted of six horses, two wagons, three sets of harness, a quantity of grain, a lot of household and kitchen furniture, and personal effects. The contract under which the shipment was made provided that the horses should be loaded, fed, watered, and cared for by the shipper at his own expense, and that one man in charge of them would be passed free on the train that carried the car. It also provided that no liability would be assumed by the defendant on the horses for more than $100 each, unless by special agreement noted on the contract, and no such special agreement was noted on the contract. Plaintiff placed a man in charge of the horses, and he was permitted to, and did, ride in the car with them. When the train reached Bancroft, in this State, it was discovered that the hay which was carried in the car to be fed to the horses on the trip was on fire. The car was broken open, and the man in charge of the horses was found asleep. The train men and others present attempted to extinguish the fire, but before they succeeded in putting it out the horses were killed, and the other property destroyed. This action was brought to recover the value of the property. There was a verdict and judgment for plaintiff, and defendant appeals.

Reed, J. 1. There was evidence which tended to prove that the fire was communicated to the car from a lantern which the man in charge of the horses had taken into the car. This lantern was furnished by plaintiff, and was taken into the car by his direction. Defendant asked the Circuit Court to instruct the jury that if the fire which destroyed the property was caused by a lighted lantern in the sole use and control of plaintiff's servant, who was in the car in charge of the property, plaintiff could not recover. The court refused to give this instruction, but told the jury that, if the fire was occasioned by the fault or negligence of plaintiff's servant, who was in charge of the property, there could be no recovery. The jury might have found from the evidence that the fire was communicated to the hay from the lantern, but that plaintiff's servant was not guilty of any negligence in the matter. The question presented by this assignment of error, then, is whether a common carrier is responsible for the injury or destruction of property while it is in the course of transportation, when the injury is caused by some act

of the owner, but which is unattended with any negligence on the part of the owner.

The carrier is held to be an insurer of the safety of the property while he has it in possession as a carrier. His undertaking for the care and safety of the property arises by the implication of law out of the contract for its carriage. The rule which holds him to be an insurer of the property is founded upon consideration of public policy. The reason of the rule is that, as the carrier ordinarily has the absolute possession and control of the property while it is in the course of shipment, he has the most tempting opportunities for embezzlement or for fraudulent collusion with others. Therefore, if it is lost or destroyed while in his custody, the policy of the law imposes the loss upon him. Coggs *v.* Bernard, 2 Ld. Raym. 909; Forward *v.* Pittard, 1 Durn. & E. 27 [**97**]; Riley *v.* Horne, 5 Bing. 217 [**169**]; Thomas *v.* Railway Co., 10 Metc. 472; Roberts *v.* Turner, 12 Johns. 232 [**32**]; Moses *v.* Railway Co., 24 N. H. 71; Rixford *v.* Smith, 52 id. 355. His undertaking for the safety of the property, however, is not absolute. He has never been held to be an insurer against injuries occasioned by the act of God, or the public enemy, and there is no reason why he should be; and it is equally clear, we think, that there is no consideration of policy which demands that he should be held to account to the owner for an injury which is occasioned by the owner's own act; and whether the act of the owner by which the injury was caused amounted to negligence is immaterial also. If the immediate cause of the loss was the act of the owner, as between the parties, absolute justice demands that the loss should fall upon him, rather than upon the one who has been guilty of no wrong; and it can make no difference that the act cannot be said to be either wrongful or negligent. If, then, the fire which occasioned the loss in question was ignited by the lantern which plaintiff's servant, by his direction, took into the car, and which, at the time, was in the exclusive control and care of the servant, defendant is not liable, and the question whether the servant handled it carefully or otherwise is not material. This view is abundantly sustained by the authorities. See Hutch. Carr., § 216, and cases cited in the note; also Lawson Carr. §§ 19, 23.

[The other paragraphs of the opinion relate to the validity of a contract purporting to limit defendant's liability. The Court holds that in this respect there was no error.]

The judgment of the Circuit Court will be *Reversed.*

d. *Nature of goods.*

CLARKE *v.* ROCHESTER, ETC. R. CO.

14 N. Y. 571. 1856.

The action was brought in the Supreme Court, to recover damages for the loss of a horse, by means of the alleged negligence of the defendants as common carriers. On the trial before W. F. Allen, J., at the Oneida Circuit, in October, 1853, it appeared that the plaintiffs embarked four horses on one of the defendants' cars, at Rochester, to be carried, for hire, eastward the whole length of the defendants' road, and beyond, and that when the train arrived at Auburn it was found that one of them was dead. This horse had a halter around his head and nose, which was tied to a staple driven into the side of the car. When found, he was lying upon his side, his head still held up by the halter, and blood was running from his nostrils.

On the part of the defence it was shown that one of the plaintiffs was present when the horses were put into the car, and assisted in fastening the one which was killed. It appeared that one of the plaintiffs was allowed, in the bargain for the carriage, a passage for himself on the train which carried the horses, there being a passenger car attached to that train, but that he in fact took passage in a passenger train of the defendants, which started at a later hour, and which passed the cattle train before it reached Auburn. There was evidence *pro* and *con*, as to whether this car was a suitable one for the transportation of horses; the plaintiffs' witnesses testify that it was too low, and those of the defendants that it was one of the kind commonly used for carrying horses.

The defendants' counsel moved for a nonsuit, on the ground that the defendants were not responsible for the class of injuries which result, wholly or in part, from the conduct of animals intrusted to them to carry. They also contended that it was the duty of the plaintiff, under the facts proved, to have gone in the train with the horses and to have taken care of them, and that the defendants' duty was limited to transporting the car which contained them in safety. The motion was denied, and the defendants excepted.

The judge left it to the jury to determine whether, by the contract, the plaintiff was to go with the horses and take care of them, stating that in that case the defendants were not responsible. He charged that, if such was not the contract, the defendants were responsible, unless the injury was received by a danger incident to this mode of carriage of this species of property, and which the defendants could not, by the exercise of diligence and care, prevent, or by inevitable accident; that, in the absence of any agreement to

the contrary, it was the business of the defendants to provide a person to look after the horses on their passage, if their safety required such oversight. The defendants' counsel excepted, and there was a verdict for the plaintiffs. The judgment having been affirmed at a general term in the fifth district, the defendants appealed.

Denio, C. J. The fact that the plaintiff was allowed a passage for himself on the train in which his horses were carried did not prove conclusively, if at all, that he was to attend to their safety during the journey. It may very well be that he desired to be present at the time and place of delivery in order to take care of them there, and that the privilege of taking passage in the same train was allowed him for that purpose. The charge which permitted the jury to find an agreement which would relieve the defendants from the obligation to keep an oversight of the animals was as favorable to them as they could require.

As to the carrier's liability respecting the transportation of this sort of property, several theories have been suggested on the argument and in our consultations upon this case.

The plaintiffs contend for the rule that the carrier is bound to transport in safety and deliver at all events, save only the known cases in which a carrier of ordinary chattels is excused, while the defendants maintain that they are not insurers at all against the class of accidents which arise from the vitality of the freight. We are of opinion that neither of these positions is well taken. A bale of goods or other inanimate chattel may be so stowed as that absolute safety may be attained, except in transportation by water, where the carrier usually excepts the perils of the navigation, and except in cases of inevitable accident. The rule, established from motives of policy, which charges the carrier in almost all cases, is not therefore unreasonable in its application to such property. But the carrier of animals, by a mode of conveyance opposed to their habits and instincts, has no such means of securing absolute safety. They may die of fright, or by refusing to eat, or they may, notwithstanding every precaution, destroy themselves in attempting to break away from the fastenings by which they are secured in the vehicle used to transport them, or they may kill each other. In such cases, supposing all proper care and foresight to have been exercised by the carrier, it would be unreasonable in a high degree to charge him with the loss. The reasons stated by Chief Justice Marshall, in pronouncing the judgment of the Supreme Court of the United States, in Boyce *v.* Anderson, 2 Peters, 150, have considerable application to this case. It was there held that the carrier of slaves was not an insurer of their safety, but was liable only for ordinary neglect; and this was put mainly upon the ground that he could not have the same absolute control over them that he has over inanimate matter. Where, however, the cause of the damage for which recompense is sought is unconnected with the conduct or pro-

pensities of the animal undertaken to be carried, the ordinary responsibilities of the carrier should attach. Palmer *v.* The Grand Junction Railway Company, 4 Mees. & Wels. 749, was the case of an action against the railway company for negligence in carrying horses, by which one was killed and others injured; but the damage was occasioned by the carriages running off the track of the road down an embankment, and the case did not turn at all on the peculiarity of the freight, but mainly on the question whether the defendants had limited their responsibility by a notice. The jury found that notice had not been given and that the defendants had been guilty of gross negligence. Mr. Baron Parke, in giving the opinion of the court, declared that the common-law duty of carriers was cast upon the defendants. The precise question now before us was not discussed, but it was assumed that the law of carriers applied to the case. There is no reason why it should not, in all cases of accident unconnected with the conduct of the animals. But the rule which would exempt the carrier altogether from accidents arising out of the peculiar character of the freight, irrespective of the question of negligence, would be equally unreasonable. It would relieve the carrier altogether from those necessary precautions which any person becoming the bailee, for hire, of animals is bound to exercise, and the owner, where he did not himself assume the duty of seeing to them, would be wholly at the mercy of the carrier. The nature of the case does not call for any such relaxation of the rule, and, considering the law of carriers to be established upon considerations of sound policy, we would not depart from it, except where the reason upon which it is based wholly fails, and then no further than the cause for the exception requires.

We cannot, therefore, assent to the position of the counsel for either of the parties in this case. The learned judge who tried this case gave to the jury the true principle of liability in such cases. Laying out of view the idea of inevitable accident, which it was not pretended had occurred, he instructed them that the defendants were responsible, unless the damage was caused by an occurrence incident to the carriage of animals in a railroad car, and which the defendants could not, by the exercise of diligence and care, have prevented. This accords with our understanding of the law.

There was sufficient evidence of negligence to be submitted to the jury. Besides what was said by the witness as to the size of the car, it was quite probable that if a proper watch had been kept, the horse would have been saved from strangulation. It was for the jury to say whether prudence did not require that a servant of the defendants should have been stationed in or about the horse-car, so as to observe the conduct and condition of the animals constantly or at short intervals.

We think no error was committed on the trial to the prejudice of the defendants, and that the judgment should be affirmed.

EVANS *v.* FITCHBURG R. CO.

111 Mass. 142. 1872.

Tort against common carriers to recover for injuries to the plaintiff's horse.

Ames, J. According to the established rule as to the liability of a common carrier, he is understood to guarantee that (with the well-known exception of the act of God and of public enemies) the goods intrusted to him shall seasonably reach their destination, and that they shall receive no injury from the manner in which their transportation is accomplished. But he is not, necessarily and under all circumstances, responsible for the condition in which they may be found upon their arrival. The ordinary and natural decay of fruit, vegetables, and other perishable articles; the fermentation, evaporation, or unavoidable leakage of liquids; the spontaneous combustion of some kinds of goods,—are matters to which the implied obligation of the carrier, as an insurer, does not extend. Story on Bailments, §§ 492 *a*, 576. He is liable for all accidents and mismanagement incident to the transportation and to the means and appliances by which it is effected; but not for injuries produced by, or resulting from, the inherent defects or essential qualities of the articles which he undertakes to transport. The extent of his duty in this respect is to take all reasonable care and use all proper precautions to prevent such injuries, or to diminish their effect, as far as he can; but his liability, in such cases, is by no means that of an insurer.

Upon receiving these horses for transportation, without any special contract limiting their liability, the defendants incurred the general obligation of common carriers. They thereby became responsible for the safe treatment of the animals, from the moment they received them until the carriages in which they were conveyed were unloaded. Moffat *v.* Great Western Railway Co., 15 Law T. n. s. 630. They would be unconditionally liable for all injuries occasioned by the improper construction or unsafe condition of the carriage in which the horses were conveyed, or by its improper position in the train, or by the want of reasonable equipment, or by any mismanagement, or want of due care, or by any other accident (not within the well-known exception) affecting either the train generally or that particular carriage. But the transportation of horses and other domestic animals is not subject to precisely the same rules as that of packages and inanimate chattels. Living animals have excitabilities and volitions of their own which greatly increase the risks and difficulties of management. They are carried in a mode entirely opposed to their instincts and habits; they may be made uncontrollable by fright, or, notwithstanding every precaution, may

destroy themselves in attempting to break loose, or may kill each other. If the injury in this case was produced by the fright, restiveness, or viciousness of the animals, and if the defendants exercised all proper care and foresight to prevent it, it would be unreasonable to hold them responsible for the loss. Clark *v.* Rochester & Syracuse Railroad Co., 4 Kern. 570. Thus it has been held that if horses or other animals are transported by water, and in consequence of a storm they break down the partition between them, and by kicking each other some of them are killed, the carrier will not be held responsible. Laurence *v.* Aberdein, 5 B. & Ald. 107. Story on Bailments, § 576. Angell on Carriers, 214 *a*. The carrier of cattle is not responsible for injuries resulting from their viciousness of disposition, and the question what was the cause of the injury is one of fact for the jury. Hall *v.* Renfro, 3 Met. (Ky.) 51 [25]. And in a New York case, Conger *v.* Hudson River Railroad Co., 6 Duer, 375, Mr. Justice Woodruff says, in behalf of the court: "We are not able to perceive any reason upon which the shrinkage of the plaintiff's cattle, their disposition to become restive, and their trampling upon each other when some of them lie down from fatigue, is not to be deemed an injury arising from the nature and inherent character of the property carried, as truly as if the property had been of any description of perishable goods."

It appears to us, therefore, that the first instruction which the defendants requested the court to give should have been given. If the jury found that the defendants provided a suitable car, and took all proper and reasonable precaution to prevent the occurrence of such an accident, and that the damage was caused by the kicking of one horse by another, the defendant was entitled to a verdict. That is to say, they might be held to great vigilance, foresight, and care, but they were not absolutely liable as insurers against injuries of that kind. As there was evidence also tending to show that the halter was attached by the plaintiff to the jaw of one of the horses in a manner which might cause or increase restiveness and bad temper, and also evidence that their shoes were not taken off, the defendants were entitled to the instruction that if the injuries were caused by the fault or neglect of the plaintiff in these particulars, he could not recover. This court has recently decided that for unavoidable injuries done by cattle to themselves or each other, in their passage, the common carrier is not liable. Smith *v.* New Haven & Northampton Railroad Co., 12 Allen, 531. This is another mode of saying that a railroad corporation, in undertaking the transportation of cattle, does not insure their safety against injuries occasioned by their viciousness and unruly conduct. Kendall *v.* London & Southwestern Railway Co., L. R. 7 Ex. 373. The jury should therefore have been instructed that if the injury happened in that way, and if the defendants exercised proper care and foresight in placing and securing the horses while under their charge, they are

not to be held liable in this action. Upon this point the burden of proof may be upon the defendants, but they should have been permitted to go to the jury upon the question whether there had been reasonable care on their part.

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Exceptions sustained.

KINNICK BROS. *v.* CHICAGO, ETC. R. CO.

69 Iowa, 665. 1886.

PLAINTIFF delivered a car-load of hogs to defendant at Drakeville, in this State, for transportation to the Union stock-yards at Chicago. A passenger train on defendant's road was thrown from the track near Ottawa, Illinois, and the obstruction caused by the accident delayed the train on which the plaintiff's hogs were shipped for about twelve hours. When the train arrived at Chicago, eighteen of the hogs were dead, and others were so injured as to depreciate their value in market. Plaintiff brought this action to recover the damages occasioned by the injury, alleging that defendant had violated its undertaking as a common carrier to deliver the hogs in Chicago within a reasonable time and in good order; also, that the injury was caused by defendant's negligence. The defendant in its answer denied that the delay in delivering the hogs in Chicago was caused by any negligence on its part, and averred that the train was delayed by unavoidable accident; and averred that the hogs were loaded on the car by plaintiffs; that they had full charge of the work of loading them; that, without defendant's knowledge or consent, they overloaded the car; and that the injury to the hogs while being transported was occasioned by such overloading. The verdict and judgment were for plaintiffs, a motion for a new trial being denied. Defendant appealed.

REED, J. I. Defendant offered evidence on the trial to prove that the wreck which obstructed the track, and delayed the train on which the hogs were being transported, occurred without fault on its part, and that it caused the track to be cleared and sent the train forward as soon after the accident as practicable; but the evidence was excluded by the court on the plaintiff's objection. Defendant sought to prove these facts in excuse of the delay in delivering the hogs at Chicago. There was no express undertaking by the defendant to transport the property to its destination within any specified time. The law, however, implies an undertaking by it to deliver it there within a reasonable time. But, with reference to the time to be occupied in transporting the property, the carrier is not held to the extraordinary liability to which he is held for its safety while it is in his custody and he may excuse delay in its delivery by proof

of misfortune or accident, although not inevitable or produced by act of God (Hutch. Carr., § 330; Parsons *v.* Hardy, 14 Wend. 215); so that, if plaintiffs had sought to recover merely on the ground that there was delay in the transportation of the property, there would be no doubt, perhaps, but defendant would have been entitled to show the facts which the excluded evidence would have tended to prove as an excuse for the delay. But that is not the substance of their complaint.

It is true, they allege that there was delay, but they do not claim that they were damaged by the mere fact of the delay, and the ground upon which they seek to recover is that the property was in bad condition when it reached its destination. It was not disputed that the property was in bad condition when it arrived in Chicago. The burden was therefore on defendant to establish facts which would relieve it from liability because of its bad condition. It was an insurer of the safety of the property while in its charge for transportation, and it was not released from that extraordinary liability for its care by the accident which caused the delay, even though it offered an excuse for the delay. It was bound, notwithstanding the accident, to use the highest degree of care during the delay for the safety of the property. If the removal of the hogs from the car during the time was necessary for their protection from injury, and it was possible to remove them, defendant was bound to do so; and it was bound to give them whatever personal attention was necessary for their protection from injury during the time. But it did not offer to show that it had unloaded them from the cars, or that it was impossible to unload them, or that it was not necessary for their safety to unload them, or that the injury did not occur in consequence of its failure to give them such personal attention as was essential to their safety. But the extent of its offer was to show facts which tended merely to excuse the delay in their transportation. We are very clear that those facts do not afford an excuse for the bad condition of the property at the time of its delivery. The evidence was immaterial, and was rightly excluded.

II. It was shown on the trial that it is the disposition of hogs, when being transported on cars, to struggle to get near to the doors when the train is standing, if the weather is hot, and to crowd away from them if it is cold, and that in doing this they are apt to "pile up," and that when this occurs those beneath are liable to be smothered, unless they receive immediate attention. The court instructed the jury, in effect, that, when the defendant contracted to carry the hogs to their destination, the law imposed upon it the obligation to carry them in a proper manner, and deliver them in good condition, considering the ordinary perils of the road, and that, if it failed to deliver them in such condition, it was responsible in damages for such failure. The instruction holds that defendant was an insurer of the safety of the property, and that its

liability extended to all injuries to the property during its transportation, except such as may have resulted from the ordinary perils of the road, such as the usual shrinkage in weight, and such loss from death as would ordinarily occur on the trip with good care and management. Counsel for appellant contend that, as the cause of the injury in question was connected with the natural propensities and characteristics of the property, it was one against which the carrier is held not to be an insurer, and that the instruction is erroneous on that ground.

It was held in effect, by this court in McCoy *v.* Keokuk & D. M. R'y Co., 44 Iowa, 424, that, when the cause of damage for which recompense is sought, is connected with the character or propensities of the animals undertaken to be carried, the ordinary responsibility of the carrier does not attach. The reasons for the exception to the general rule as to the liability of the carrier, which arises when he undertakes to transport live-stock, are very apparent. There are dangers incident to the transportation of that character of property which are created entirely by the disposition and propensities of the animals, and against which it is often impossible for the carrier to make adequate provision. But the rule of the common law is modified only so far as is rendered necessary by the character of the property in this respect. In every other respect the carrier is held to be an insurer of the property.

In our opinion, the present case is not within the exception to the rule. The injury was caused by the "piling up" of the hogs while struggling to get near to or away from the doors of car. The propensity, however, was to do this only when the train was standing. Owing to the obstruction of the track, it was kept standing at a station for twelve hours, and, without doubt, it was during that time that the injury occurred. But the danger was not one against which provision could not be made. The injury might have been prevented either by unloading the hogs or giving them personal attention while in the car. There is no claim that this could not have been done, and we think defendant was bound to do it. As there was nothing shown which tended to take the case out of the general rule, the court was right in instructing that defendant was bound by that rule.

III. Plaintiffs loaded the hogs on to the car without assistance or direction from defendant's agents or employees. Defendant claimed that the car was overloaded, and that the injury was caused by such overloading. The court instructed the jury that, if defendant had knowledge of the number of hogs in the car, and of the condition of the car as to the loading when it received it, or if it might have known these facts, it could not escape liability for the damage on the ground that the car was overloaded. Exception is taken to this instruction. But we think it correct. It is not claimed that there was any deceit or misrepresentation by plaintiff as to the condition

of the car or to its loading. Defendant's agent, who made the contract for it, went to the car after the loading was done, and closed and sealed it. There was nothing to prevent him from seeing the manner in which it was loaded. As defendant received the property under these circumstances, and undertook to transport it to its destination, it should be held to have assumed all the liabilities of a common carrier with reference to it.

The judgment of the District Court will be

Affirmed.

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e. *Carrier's Fault or Negligence.*

SCOVILL *v.* GRIFFITH.

12 N. Y. 509. 1855.

Action commenced in the Supreme Court in 1849 against the defendant as a common carrier to recover for his omission to transport to and deliver at Albany merchandise, shipped by the plaintiffs on board the defendant's boat at New York, consigned to Albany, whereby, as the plaintiffs alleged, the property, being of the value of three hundred and twenty-four dollars, became lost to them, and they also lost the benefit of the sale of the same to one Greenman, to their damage of one hundred dollars; the plaintiffs demanded judgment for four hundred and twenty-four dollars, being the amount of the value of the merchandise and the damages alleged to have been sustained by not selling it.

The cause was tried in the city of New York, before Mr. Justice Edwards and a jury. It appeared that on and prior to the 24th of May, 1849, the defendant was the owner of a line of barges, known as "Griffith's New York and Troy Line," employed in transporting goods and merchandise on the Hudson River; that the plaintiffs were merchants in the city of New York; that prior to the delivery of the property in question on board the defendant's boat, the plaintiffs had contracted to sell it to one Greenman, they to deliver it at the store of Ainsworth & Northrop, in Albany, when it was to become his. A witness on the part of the plaintiffs testified that on the 23d of May, the defendant agreed with the plaintiffs to transport all the merchandise they might desire to send to Troy or Albany at six cents a package; that the defendant, on this occasion, informed the plaintiffs that his boats did not go to Albany, but that when they wished the goods to go to Albany, to send the carman with them to his office, and he would give directions as to the boat they should be delivered upon. White, a carman, sworn on behalf of the plaintiffs, testified that on the 24th of May he, at the plaintiff's request,

delivered nine packages of medicine on board the barge "McCoun," then lying at one of the piers in New York, she being one of the boats belonging to the defendant's line, to be transported and delivered at Albany; that when he received the packages he took with him the plaintiff's receipt book with the receipt hereinafter set out written therein, except the name of the boat and the signature thereto; that he called with the goods at the office of the defendant's line to get directions as to the boat upon which they should be delivered; that he showed the receipt written in the book to a person in the office, who directed him to deliver the packages on board the "McCoun;" that on going to the boat the captain, Wilson, when he saw the goods were marked for Albany, refused to receive them, saying the boat did not go there; but upon being informed by the witness that there was an understanding with the defendant that they should be taken on the boat, he received them, inserted the name of the boat in the receipt, and signed it. The receipt was as follows: —

"New York, May 24, 1849.

"Received from A. L. Scovill & Co., in good order, on board the Griffith's line, bound for Albany, marked S., S. H. Greenman.

"Care of Ainsworth & Northrop, } McCoun,
"No. 15 State street, Albany. } 9 boxes Mdse.

"Wilson."

This witness further testified: That when the captain saw the packages marked as stated in the above receipt, he said they should be marked Troy instead of Albany, and that he, the witness, replied that they were correctly marked, and showed him the above receipt prepared for signature, and also informed him that he was directed at the office to deliver them on that boat; that the captain still declining to receive and receipt them, he commenced reloading them on his cart, when the captain told him that his boat did not go to Albany, but to leave the goods and he would take them; that thereupon they were delivered on board and the receipt signed. The plaintiffs further proved, that the usual time for transporting merchandise from New York to Albany was twenty-four hours; that Greenman, who resided in the western part of the State, advised Ainsworth & Northrop that the property would be delivered there for him about the 26th of May, and that he called and sent there for it several times soon after that date, and that, it not arriving, he gave them no further directions in reference to it. The plaintiffs further proved that the packages were taken by the boat to Troy, where they remained in the defendant's warehouse until the 7th of July, 1849, when they were delivered by the defendant to a carrier to be taken to Albany and delivered to Ainsworth & Northrop; and that the carrier on that day took them to the latter firm at Albany and offered to deliver them, subject to the payment of five shillings,

his charge for bringing them from Troy; but the latter firm refused to receive the goods because, as they stated, the time for delivery had passed and they had orders not to receive the property; and that thereupon the carrier stored the packages in Albany, where they remained at the time of the trial. The plaintiff proved the value of the property to be $324.

The court, among other things, charged the jury that if, from the testimony, they should find that there was an agreement by the defendant, or those whose acts would bind him, to carry the property in question to Albany, then a question arose as to the rule of damages. That mere delay, although unreasonable, did not make the defendant chargeable for the value of the goods. That in this case there was no claim that the property was injured or deteriorated by the delay. That if they had been materially injured or deteriorated, this might authorize an abandonment of them by the owner, and give the plaintiffs a right to charge the defendant for their value; but as it was, the rule would be the difference between the highest market price of the goods, when or after they should have been delivered, and when they were actually tendered, and the expense the plaintiffs were put to by the delay. To this portion of the charge there was no exception.

The plaintiffs' counsel requested the judge to charge, that if there was an agreement to carry the goods to Albany, that unreasonable delay in the delivery of goods made the defendant liable to account for their full value; that the law imposed this liability upon common carriers, as a penalty for delay, although it might not be so with other bailees. The court refused to so charge, and the counsel for the plaintiffs excepted. The jury rendered a verdict in favor of the plaintiff for $10; and judgment was rendered in favor of the defendants for the amount of their costs, less the $10. This judgment was affirmed by the Supreme Court at a general term in the 1st district. The plaintiffs appealed to this court.

Hand, J. The jury have found the contract of bailment in this case, and assessed the damages for its violation by the defendant. As to the time in which his contract is to be performed, a common carrier is bound to use all reasonable diligence. That was not done in this case; and on the question of damages, the jury probably took a view of the circumstances very favorable to the defendant. But their verdict cannot be disturbed solely upon that ground. Nor did the judge err in the admission of evidence as to the circumstances under which the receipt was given. The proposition was not to vary or explain the terms of the receipt; and the defendant had a right to show, if such was the fact, that it was obtained from his agent or servant under such circumstances as did not bind him.

There was no exception to the charge as given; and the only question really arising on this bill of exceptions is, whether the judge should have told the jury that, if there was a contract to carry the

goods to Albany, the plaintiffs were entitled, as a matter of law, to recover the full value of the goods on account of the delay. The plaintiffs asked for an unqualified charge on this point, without reference to the motives of the defendant, or any circumstances that might be supposed to explain the transaction. I think the judge could not have charged as requested. The plaintiffs state in their complaint that the property was wholly lost to them, and that they lost the sale to Greenman. But the testimony does not sustain that allegation; not in a legal sense.

Before the Code, a good way of ascertaining legal obligations was by considering the remedies by which they were enforced. A supposed uniform and universal remedy in all cases has, in a measure, deprived us of these aids; but still some light may be obtained from analogy. This property was, from some cause, detained in Troy, some half dozen miles from Albany, about six weeks; and the defendant, during that time, made no effort to send it to its destination. This was inexcusable delay, and undoubtedly entitled the plaintiffs to all real damages sustained by them which were the natural consequence of the neglect. But it does not follow that the plaintiffs had a right to refuse and abandon the property and recover its full value. There is no evidence of a refusal to deliver, nor, indeed, that the plaintiffs ever demanded the property or gave the defendant notice that it had not been received. They were not bound to do either to give them a right of action. But the judge could not say to the jury, as matter of law, that there had been a conversion; nor does it appear that the property had deteriorated in condition or had seriously depreciated in value, nor was it lost. Where there has been a deterioration and loss, the carrier is liable. Davis *v.* Garrett, 6 Bing. 716; Ellis *v.* Turner, 8 T. R. 531; Story on Bail. § 508. In Ellis *v.* Turner, which was an action on the case, the carrier conveyed the goods beyond the place of destination, intending to deliver them on his return, but they were greatly damaged by the sinking of the vessel without any want of ordinary care or attention of the master or crew, and the carrier was held liable to make good the loss. Under the former system, to maintain trover against a carrier, there must have been an unjustifiable refusal to deliver, or delivery to a wrong person, or sale or destruction, or some actual wrong or injurious conversion; something more than mere omission. Packard *v.* Getman, 4 Wend. 613; Hawkins *v.* Hoffman, 6 Hill, 586; 2 Saund. R. 49. i. k. m. It was not necessary that the wrong should be intentional; but, as a general rule, a mere nonfeasance did not and does not work a conversion. And indeed every unauthorized intermeddling with the property of another is not a conversion. It was held by the Court of Exchequer in England that the act of the ferryman in putting the horses of the plaintiff on shore out of his ferry-boat, though the jury should find it was done wrongfully, was not a conversion of the property,

unless done with the intent to convert it to his own use or that of some third person, or unless the act had the effect to destroy it or change its quality. Foulkes *v.* Willoughby, 8 M. & W. 540. If it had appeared in this case that the defendant, from gross negligence, evincing a disregard of his contract and the rights of the plaintiffs, had carried the property by and on to another port, and had, with actual knowledge of all the facts, kept it several weeks, I am not prepared to say the jury might not have found that there was something more than omission, or that the evidence would not have sustained a verdict that the defendant was guilty of conversion, if rendered under a proper charge from the court. However, that point need not be decided here, for it was not raised upon the trial; plaintiffs putting this part of their case upon the ground of mere delay, insisting that the defendant should pay for the property as a penalty for that delay, and thus, as it were, impliedly treating the case as a continuing bailment, rather than one of loss or actual conversion to the use of the defendant. If the facts of the case would not have sustained trover, the remedy would naturally have been an action of assumpsit or case; and the plaintiffs have not shown that they would have been entitled to recover for the full value of the property in either of those actions. . . .

The judgment should be affirmed.

BLACKSTOCK *v.* NEW YORK, ETC. R. CO.

20 N. Y. 48. 1859.

APPEAL from the Superior Court of the city of New York. The action was brought against the defendant as a common carrier, for a delay in the carriage of a large quantity of potatoes in barrels and sacks, from Hornellsville in Steuben County, to the city of New York. They were received by the defendant on different days in June, 1854, and would have been delivered, according to the usual course of business, within five days, but they were detained about seventeen days, and when delivered were found to have become unmerchantable, and were nearly worthless on account of the delay in their transportation.

The delay was occasioned by the refusal of a large number of the defendant's engineers (140 out of a total number of 168) to work, under the following circumstances: On the 15th of May, 1854, the defendant adopted a new rule for the government of its engineers, to the effect that they were respectively to be accountable for running the train off the track at a switch, at any station where the train should stop. This rule was a substitute for a former one upon

the same general subject, which had been found impracticable, and which had not therefore been enforced. The referee before whom the case was tried, found, in substance, that the new rule was a reasonable and proper one, which ought to have been submitted to by the engineers. They did perform their duties under it for a time, but when it was ascertained that it would be steadily enforced, a combination, which is called in the case "a strike," was entered into, and they gave notice that they should stop work unless the regulation should be rescinded in two days. That not being done, they refused to perform any further services, and persisted for fourteen days; at the expiration of which period they returned to their duties, and have since served under the new rule. The defendant used diligent efforts to procure other engineers to run its trains, but was not successful. The delay in transporting the potatoes was owing to the circumstances mentioned. The potatoes were owned by, and the cause of action (if any) accrued in favor of, one Rosbotham, who had assigned it to the plaintiff. The referee found that the conduct of the defendant's engineers did not furnish a defence, and reported in favor of the plaintiff for $800 damages, for which judgment was entered and affirmed at a general term. The case was submitted on printed briefs.

Denio, J. The position that the defendants are not responsible, because the misconduct of their servants was wilful and not negligent, cannot be sustained. The action is not brought on account of any injury done to the property by the engineers, but for an alleged non-performance of a duty which the defendants owed to the owner of the property. If their inability to perform was occasioned by the default of persons for whose conduct they are responsible, they must answer for the consequences without regard to the motives of those persons. In the common case of a contract for services, as for building a house, which the builder had been unable to perform because his workmen had abandoned his service, proof that their conduct was wilful and every way unjustifiable would not give the party injured an action against them, nor would it excuse the party who had made the contract. A similar point was taken in Weed *v.* The Panama Railroad Company, 17 N. Y. 362, where the misconduct of the defendants' servants in detaining a train of cars was active, but it was held not to furnish any answer to the action for the detention. The cases in which it has been held that if a servant, while generally engaged in his master's business, wilfully commit a trespass, as by intentionally driving his master's carriage against the carriage of another person, the master is not liable, have no application to the present case.

It has been repeatedly held, and may be taken as settled law, that a carrier is not under the same absolute obligation to carry the goods intrusted to him in the usual time which he is to deliver them ultimately at their destination. Conger *v.* The Hudson River R. R.

Co., 6 Duer, 375; Wilbert *v.* The N. Y. & Erie R. R. Co., 2 Kern. 245. But in the absence of a legal excuse, he is answerable for any delay to forward them in the time which is ordinarily required for transportation, by the kind of conveyance which he uses. In the case referred to from Kernan's Reports, we held that where a railroad was fully equipped with engines and freight carriages, but more property was offered at a particular point than could be sent forward at once, the delay was justifiable, provided no unfair preference was given to other freight over that of the plaintiff. In the present case, the excuse arises wholly out of the misconduct of the defendants' servants who wrongfully refused to perform their duty, and thus deprived the defendants, for the time, of the ability to send forward the property; and the question is whether the defendants' case can be separated from that of the engineers, so that it can be held that though the latter were culpable, their employers, the defendants, were without fault, and consequently not responsible to the plaintiff. This involves a consideration of the legal effect of the relations which exist between these several parties. In the first place, there was no privity between the plaintiff and the engineers. The latter owed no duty to the former which the law can recognize. If they had committed a positive tort or trespass upon the property, the owner might pass by the employers and hold them responsible, but for a nonfeasance, or simple neglect of duty, they were only answerable to their employers. The maxim in such cases is *respondeat superior*. Story on Agency, § 309; Denny *v.* The Manhattan Co., 2 Denio, 115; s. c. in error, 5 id. 639. Although the nature of the contract between the railroad company and the engineers is not disclosed in the finding, it is quite improbable that it was such that the latter might throw up their employment upon two days' notice without any legal cause. If it were of that character, the liability, moral as well as legal, would rest upon the defendants, for in that case they would have neglected a most ordinary precaution for securing the continuous running of their trains. Assuming then that abandoning their work was a breach of contract on the part of the engineers, they by that act became responsible to the defendants for all its direct consequences. The case therefore is one in which the actual delinquents, through whose fault the injury was sustained, were responsible to the defendants, but were not responsible to the plaintiff. This shows the equity of the rule, which holds the master or employer answerable in such cases. Its policy is not less apparent. Those who intrust their goods to carriers have no means of ascertaining the character or disposition of their subordinate agents or servants; they have no agency in their selection, and no control over their actions. In the case of a loss by the misconduct of a servant, the party injured has no means of ascertaining whether due caution was exercised by the master in employing him, or prudence in retaining him; and in the case of a controversy between

the master and the servant as to which was the real delinquent, the owner of the property must generally be without the necessary evidence to charge the liability upon the master. The rule which the law has adopted, by which the master is held responsible for the acts of his servants, is the one best calculated to secure the observance of good faith on the part of persons intrusted with the property of others. The motive of self-interest is the only one adequate to secure the highest degree of caution and vigilance by the master. The principle itself is extremely well settled. Story on Agency, § 452; 2 Kent Com. 259; Harlow *v.* Humiston, 6 Cow. 189; Ellis *v.* Turner, 8 Term R. 531.

I cannot see anything in the circumstances of the defendants to take the case out of the rule. Being a corporation, all their business must necessarily be conducted by agents, and if they are not liable for their acts and omissions, parties dealing with them have no remedy at all. A railroad corporation is no doubt peculiarly exposed to loss from the misconduct of its engineers; and in the present case it does not appear that the slightest blame can attach to any of the superior officers of the company. Still the property intrusted to the defendants to carry has been lost from a failure on their part to perform the duty with which they were charged, and the only answer which they are able to make to the demand for compensation is that the failure was caused by the misconduct of their servants. This we have seen cannot avail them as a defence. I have looked into the exceptions to the rulings of the judge upon the trial, and think those rulings were in both the instances where exceptions were taken entirely correct.

The judgment of the Supreme Court must be affirmed.

GEISMER *v.* LAKE SHORE, ETC. R. CO., APPELLANT.

102 N. Y. 563. 1886.

APPEAL from judgment of the General Term of the Supreme Court, in the fifth judicial department, entered upon an order made at the October Term, 1884, which overruled defendant's exceptions and directed judgment for plaintiff on a verdict (reported below, 34 Hun, 50).

This action was brought to recover damages for alleged negligence on the part of defendant in the performance of a contract for transportation of livestock.

EARL, J. We are of opinion that the learned trial judge fell into error as to rules of law of vital and controlling importance in the disposition of this case.

A railroad carrier stands upon the same footing as other carriers, and may excuse delay in the delivery of goods by accident or misfortune not inevitable or produced by the act of God. All that can be required of it in any emergency is that it shall exercise due care and diligence to guard against delay and to forward the goods to their destination; and so it has been uniformly decided. Wibert *v.* N. Y. & Erie Railroad Co., 12 N. Y. 245; Blackstock *v.* N. Y. & Erie Railroad Co., 20 id. 48.

In the absence of special contract there is no absolute duty resting upon a railroad carrier to deliver the goods intrusted to it within what, under ordinary circumstances, would be a reasonable time. Not only storms and floods and other natural causes may excuse delay, but the conduct of men may also do so. An incendiary may burn down a bridge, a mob may tear up the tracks or disable the rolling stock or interpose irresistible force or overpowering intimidation, and the only duty resting upon the carrier, not otherwise in fault, is to use reasonable efforts and due diligence to overcome the obstacles thus interposed and to forward the goods to their destination.

While the court below conceded this to be the general rule, it did not give the defendant the benefit of it because it held that the men engaged in the violent and riotous resistance to the defendant were its employees for whose conduct it was responsible, and in that holding was the fundamental error committed by it. It is true that these men had been in the employment of the defendant. But they left and abandoned that employment. They ceased to be in its service or in any sense its agents, for whose conduct it was responsible. They not only refused to obey its orders or to render it any service, but they wilfully arrayed themselves in positive hostility against it, and intimidated and defeated the efforts of employees who were willing to serve it. They became a mob of vicious law-breakers to be dealt with by the government, whose duty it was, by the use of adequate force, to restore order, enforce proper respect for private property and private rights and obedience to law. If they had burned down bridges, torn up tracks, or gone into passenger cars and assaulted passengers, upon what principle could it be held that as to such acts they were the employees of the defendant for whom it was responsible? If they had sued the defendant for wages for the eleven days when they were thus engaged in blocking its business, no one will claim that they could have recovered.

It matters not, if it be true, that the strike was conceived and organized while the strikers were in the employment of the defendant. In doing that, they were not in its service or seeking to promote its interests or to discharge any duty they owed it; but they were engaged in a matter entirely outside of their employment and seeking their own ends and not the interests of the defendant. The misconduct did not come from the strike — from the refusal of the

employees to work, but from their violent and unlawful conduct after they had abandoned the service of the defendant.

Here upon the facts, which we must assume to be true, there was no default on the part of the defendant. It had employees who were ready and willing to manage its train and carry forward the stock, and thus perform its contract and discharge its duty; but they were prevented by mob violence which the defendant could not by reasonable efforts overcome. That under such circumstances the delay was excused has been held in several cases quite analogous to this which are entitled to much respect as authorities. Pittsburg & C. R. R. Co. *v.* Hogen, 84 Ill. 36; Pittsburg, C. W. L. R. Co. *v.* Hallowell, 65 Ind. 188; Bennett *v.* L. S. & M. S. R. R. Co., 6 Am. & Eng. R. Cas. 391; I. & W. L. R. R. Co. *v.* Juntzen, 10 Bardwell, 295.

The cases of Weed *v.* Panama R. R. Co., 17 N. Y. 362, and Blackstock *v.* N. Y. & Erie R. R. Co., 1 Bosw. 77; affirmed, 20 N. Y. 48 [**142**], do not sustain the plaintiff's contention here. If in this case the employees of the defendant had simply refused to discharge their duties, or to work, or had suddenly abandoned its service, offering no violence, and causing no forcible obstruction to its business, those authorities could have been cited for the maintenance of an action upon principles stated in the opinions of those cases.

Judgment reversed.[1]

DAVIS *v.* GARRETT.

Common Pleas. 6 Bing. 716. 1830.

The declaration stated, that theretofore, to wit, on 22d of January, 1829, at London, in the parish of St. Mary-le-Bow, in the ward of Cheap, the plaintiff, at the special instance and request of the defendant, delivered to the defendant on board a certain barge or vessel of the defendant called the "Safety," and the defendant then and there had and received in and on board of the said barge or vessel from the plaintiff a large quantity, to wit, 114½ tons of lime of the plaintiff of great value, to wit, of the value of £100, to

[1] Where employees suddenly refuse to work, and are discharged, and delay results from the failure of the carrier to supply promptly their places, such delay is attributable to the misconduct of the employees in refusing to do their duty, and this misconduct in such case is justly considered the proximate cause of the delay; but when the places of the recusant employees are promptly supplied by other competent men, and the "strikers" then prevent the new employees from doing duty by lawless and irresistible violence, the delay resulting solely from this cause is not attributable to the misconduct of employees, but arises from the misconduct of persons for whose acts the carrier is in no manner responsible. Per Dickey, J., in Pittsburg &c. R. Co. *v.* Hazen, 84 Ill. 36.

be by the defendant carried and conveyed in and on board the said barge or vessel from a certain place, to wit, Bewly Cliff in the county of Kent, to the Regent's Canal in the county of Middlesex, the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature or kind soever excepted, for certain reasonable reward to be therefore paid by the plaintiff to the defendant: that the said barge or vessel afterwards, to wit, on, etc., at, etc., departed and set sail on the intended voyage, then and there having the said lime on board of the same to be carried and conveyed as aforesaid, except as aforesaid, and it thereby then and there became and was the duty of the defendant to have carried and conveyed the said lime on board of the said barge or vessel from Bewly Cliff to the Regent's Canal, the act of God, and such other matters and things excepted as were above mentioned to have been excepted by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecessary deviation or departure from, or delay or hindrance in the same: but the defendant, not regarding his duty in that behalf, but contriving and wrongfully intending to injure and prejudice the plaintiff in that respect, did not carry or convey the said lime on board of the barge or vessel from Bewly Cliff aforesaid to the Regent's Canal, although not prevented by the acts, matters, or things excepted as aforesaid, or any of them, by and according to the direct, usual, customary way and passage, without any voluntary and unnecessary deviation or departure from, or delay or hindrance in the same, but on the contrary thereof, afterwards, and before the arrival of the said barge or vessel as aforesaid at the Regent's Canal, the defendant by one John Town, the master of the said barge or vessel, and the agent of the defendant in the behalf, to wit, at, etc., without the knowledge and against the will of the plaintiff, voluntarily and unnecessarily deviated and departed from and out of such usual and customary way, course, and passage, with the said barge or vessel so having the said lime on board of the same, to certain parts out of such usual and customary course and passage, to wit, to a certain place called the East Swale, and to a certain place called Whitstable Bay, and did then and there voluntarily and unnecessarily carry and navigate the said barge or vessel with the lime on board thereof as aforesaid to the said parts out of such usual and customary course and passage as aforesaid, and delay and detain the said last-mentioned barge or vessel with the lime on board thereof, for a long space of time, to wit, for the space of twenty-four hours then next following: and the said barge or vessel so having the said lime on board of the same, was by reason of such deviation and departure, and delay and detention out of such usual and customary course and passage, and before her arrival at the Regent's Canal aforesaid, to wit, on, etc., at, etc., exposed to and assailed by a great storm and great and heavy sea, and was thereby

then and there wrecked, shattered, and broken, and by means thereof the said lime of the plaintiff so on board the said barge or vessel as aforesaid, became and was injured, burned, destroyed, and wholly lost to the plaintiff, to wit, at, etc., whereby the plaintiff lost divers great gains, profits, and emoluments, amounting to a large sum of money, to wit, the sum of £50, which he might and otherwise would have made thereby, to wit, at, etc.

At the trial before Tindal, C. J., London sittings after Michaelmas Term last, it appeared that the master of the defendant's barge had deviated from the usual and customary course of the voyage mentioned in the declaration, without any justifiable cause; and that afterwards, and whilst such barge was out of her course, in consequence of violent and tempestuous weather, the sea communicated with the lime, which thereby became heated, and the barge caught fire; and the master was compelled, for the preservation of himself and the crew, to run the barge on shore, where both the lime and the barge were entirely lost.

A verdict having been found for the plaintiff,

Taddy, Sergt., obtained a rule *nisi* for a new trial, or to arrest the judgment.

TINDAL, C. J. There are two points for the determination of the court upon this rule: first, whether the damage sustained by the plaintiff was so proximate to the wrongful act of the defendant as to form the subject of an action; and, secondly, whether the declaration is sufficient to support the judgment of the court for the plaintiff.

As to the first point it appeared upon the evidence that the master of the defendant's barge had deviated from the usual and customary course of the voyage mentioned in the declaration without any justifiable cause; and that afterwards, and whilst such barge was out of her course, in consequence of stormy and tempestuous weather, the sea communicated with the lime, which thereby became heated, and the barge caught fire, and the master was compelled for the preservation of himself and the crew to run the barge on shore, where both the lime and the barge were entirely lost.

Now the first objection on the part of the defendant is not rested, as indeed it could not be rested, on the particular circumstances which accompanied the destruction of the barge; for it is obvious that the legal consequences must be the same, whether the loss was immediately, by the sinking of the barge at once by a heavy sea, when she was out of her direct and usual course, or whether it happened at the same place, not in consequence of an immediate death's wound, but by a connected chain of causes producing the same ultimate event. It is only a variation in the precise mode by which the vessel was destroyed, which variation will necessarily occur in each individual case.

But the objection taken is, that there is no natural or necessary

connection between the wrong of the master in taking the barge out of its proper course, and the loss itself; for that the same loss might have been occasioned by the very same tempest, if the barge had proceeded in her direct course.

But if this argument were to prevail, the deviation of the master, which is undoubtedly a ground of action against the owner, would never, or only under very peculiar circumstances, entitle the plaintiff to recover. For if a ship is captured in the course of deviation, no one can be certain that she might not have been captured if in her proper course. And yet, in Parker *v.* James, 4 Camph. 112, where the ship was captured whilst in the act of deviation, no such ground of defence was even suggested. Or, again, if the ship strikes against a rock, or perishes by storm in the one course, no one can predicate that she might not equally have struck upon another rock, or met with the same or another storm if pursuing her right and ordinary voyage.

The same answer might be attempted to an action against a defendant who had, by mistake, forwarded a parcel by the wrong conveyance, and a loss had thereby ensued; and yet the defendant in that case would undoubtedly be liable.

But we think the real answer to the objection is, that no wrong-doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done; but there is no evidence to that extent in the present case.

Upon the objection taken in arrest of judgment, the defendant relies on the authority of the case of Max *v.* Roberts. The first ground of objection upon which the judgment for the defendant in that case was affirmed is entirely removed in the present case. For in this declaration it is distinctly alleged that the defendant had and received the lime in and on board of his barge, to be by him carried and conveyed on the voyage in question.

As to the second objection mentioned by the learned Lord, in giving the judgment in that case, viz., that there is no allegation in the declaration that there was an undertaking to carry directly to Waterford, it is to be observed, that this is mentioned as an additional ground for the judgment of the Court, after one in which it may fairly be inferred from the language of the Chief Justice that all the judges had agreed; and which first objection appears to us amply sufficient to support the judgment of the Court. We cannot, therefore, give to that second reason the same weight as if it were the only ground of the judgment of the Court. And, at all events,

we think there is a distinction between the language of this record and that of the case referred to. In the case cited, the allegation was, that it was the duty of the defendant to carry the goods directly to Waterford; but here the allegation is, "that it was his duty to carry the lime by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecessary deviation and departure."

The words *usual and customary* being added to the word *direct*, more particularly when the breach is alleged in "unnecessarily deviating from the usual and customary way," must be held to qualify the meaning of the word *direct*, and substantially to signify that the vessel should proceed in the course usually and customarily observed in that her voyage.

And we cannot but think that the law does imply a duty in the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course.

We therefore think the rule should be discharged, and that judgment should be given for the plaintiff.

Rule discharged.

CONSTABLE *v.* NATIONAL STEAMSHIP CO.

154 U. S. 51. 1894.

Mr. Justice Brown. This case involves the liability of a steamship company for the loss by fire of a consignment of goods unloaded without personal notice to the consignee upon the wharf of a company other than the one owning the vessel.

By the Limited Liability Act, Rev. Stat. 4282 [**721**], no ship-owner is liable to answer for the loss of any merchandise shipped upon his vessel by reason of any fire "happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner," and in the case of The Scotland, 105 U. S. 24, the exemptions and limitations of this act were held to apply to foreign as well as domestic vessels. A similar exemption from fire happening without the "fault or privity" of the owner is contained in the British Merchants' Shipping Act of 1854, 17 and 18 Vict. c. 104, sec. 503. The bill of lading in this case also contains exemptions of liability from loss caused by fire "before loading in the ship or after unloading." There is no comma after the word "loading" or "ship," but obviously it should be read as if there were. In view of the fact that, under no aspect of the case, would the owner of the vessel be liable for the consequence of any fire occurring on board of such a vessel without his fault, and that an attempt is made in this case

to impose the liability, not of a warehouseman, but of a common carrier and insurer against fire, after the contract of carriage has been fully performed, it would seem that such liability ought not to be raised out of the contract in this case except upon clear evidence, and for the most cogent reasons. The liability of the company for the goods while upon the wharf is a mere incident to its liability for them while upon the ship; and if the liability is more extensive under the incidental contract of storage than it was under the principal contract of carriage it is an exception to the general rule that the incidental liability of a contracting party is not broader than his liability upon the principal contract.

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It is claimed, however, that the berthing of this ship at a pier other than her own was in legal effect a deviation, which rendered the company an insurer of the cargo discharged at such pier without notice, until its actual delivery to the consignee. In the law maritime a deviation is defined as a "voluntary departure without necessity, or any reasonable cause, from the regular and usual course of the ship insured." 1 Bouvier's Law Dict. 417; Hostetter *v.* Park, 137 U. S. 30, 40; Davis *v.* Garrett, 6 Bing. 716; Williams *v.* Grant, 1 Conn. 487; as, for instance, where a ship bound from New York to Norwich, Conn., went outside of Long Island, and lost her cargo in a storm, Crosby *v.* Fitch, 12 Conn. 410; or where a carrier is guilty of unnecessary delay in pursuing a voyage or in the transportation of goods by rail. Michaels *v.* N. Y. Central Railroad, 30 N. Y. 564. But, if such deviation be a customary incident of the voyage, and according to the known usage of trade, it neither avoids a policy of insurance, nor subjects the carrier to the responsibility of an insurer. Oliver *v.* Maryland Ins. Co., 7 Cranch, 487; Columbian Ins. Co. *v.* Catlett, 12 Wheat. 383. In Hostetter *v.* Park, 137 U. S. 30, it was held to be no deviation, in the Pittsburg and New Orleans barge-trade, to land and tie up a tow of barges, and detach from the tow such barge or barges as were designated to take on cargo *en route*, and to tow the same to the several points where the cargo might be stored, it having been shown that such delays were within the general and established usage of the trade. So, in Gracie *v.* Marine Ins. Co., 8 Cranch, 75, it was held to be no deviation to land goods at a lazaretto or quarantine station, if the usage of the trade permitted it, though by the bill of lading the goods were "to be safely landed at Leghorn." See also Phelps *v.* Hill, 1 Q. B. D. (1891), 605.

. . . . . .

Upon the whole case we are of opinion: —

1. That the stipulation in the bill of lading that respondent should not be liable for a fire happening after unloading the cargo was reasonable and valid.

2. That the discharge of the cargo at the Indian pier was not, in

the eye of the law, a deviation such as to render the carrier an insurer of the goods so unladen.

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The decree of the Circuit Court is therefore affirmed.

STEAMBOAT LYNX *v.* KING.

12 Mo. 272. 1848.

King and Fisher brought their action against the "S. B. Lynx," on a contract of affreightment. A parcel of wheat (880 sacks), was shipped on board the "Lynx" and her barges, from a place in Illinois, above the lower rapids, consigned to K. & F. at St. Louis. The barge that contained the wheat was brought down in tow by the "Lynx," to the head of the rapids. The water was too low for the boat to descend the rapids with her barges in tow, and therefore the barge which contained the wheat (and other wheat belonging to others), after being lightened by putting 200 sacks of wheat on board of the "Lynx," was taken down to the foot of the rapids at Keokuk in safety, and in the manner accustomed there, and was moored there in the accustomed place, and was stanch and well manned. In the after part of the same day, while the barge was waiting for the "Lynx" to descend the rapids, a violent storm arose, and forced a great quantity of the water of the river over the gunwale and into the barge, by which a portion of the wheat was wet. Every effort was made by the crew to protect the barge and its cargo from the storm and wetting. The hands worked all night, and part of the next day, to free the boat from water. The storm and wetting of the wheat occurred in the evening and night of Tuesday, and in the afternoon of Wednesday, the "Lynx" descended the rapids, and taking the barge in tow, ran down to St. Louis in thirty hours, arriving there on Thursday evening, and delivered the freight on the levee next day, Friday.

The time was the latter part of May, and the weather was very warm and damp, with frequent rains.

The defendant moved the court for the following instruction:

"If the jury believe from the evidence that the wheat in question was damaged by an unavoidable accident of the river, and not by the negligence of the officers and crew of the 'Lynx,' they ought to find for the defendant, as to the wheat."

Which instruction the court refused to give, but gave to the jury, at the instance of the plaintiffs, the following: —

"It was the duty of the defendant to use all the means in his power to cause the wheat to be dried after it was wet by the storm;

and if the jury believe from the evidence that the wheat might have been dried by the defendant, and he did not do it, then the defendant is liable for all damage to the wheat by reason thereof."

Under this instruction, there was a verdict for the plaintiffs, and a motion for a new trial, which was overruled; and the defendant brings the case here by a writ of error.

Napton, Judge, delivered the opinion of the court.

The only question presented by this record arises out of the refusal of the court to give an instruction asked on behalf of the boat, and the giving an instruction for the plaintiffs King & Fisher. The instruction given was this: "It was the duty of the defendant to use all the means in his power to cause the wheat to be dried after it was wet by the storm: and if the jury believe from the evidence that the wheat might have been dried by the defendant, and he did not do it, then the defendant is liable for all damages to the wheat by reason thereof." The instruction refused was as follows: "If the jury believe that the wheat in question was damaged by an unavoidable accident of the river, and not by the negligence of the officers and the crew of the 'Lynx,' they ought to find for the defendants."

The doctrine that a common carrier is responsible for all losses, except those occasioned by the act of God, or the public enemy, or such others as are expressly excepted in the bill of lading, has been uniformly maintained in this State. Dagget *v.* Price & Shaw, 3 Mo. R. 264. Experience has shown the general results of this principle to be highly beneficial in the main, although perhaps its application in particular cases may have been harsh, and we should regret to see any departure from it. But when the carrier is held responsible, not only for every damage not occasioned by inevitable accident, but also for the consequences of such accidents themselves, in cases where any possible skill or labor could restore the value of the property injured, either in whole or in part, the doctrine, it strikes us, is carried to an extent not warranted by the law, and not justified by reason or principle of public policy.

In order to view this matter in a proper light, we must recur to the original and well-settled principle, — a carrier is responsible for all losses brought about by his own acts, or want of action, for every loss which could have been prevented by human exertion, with the exceptions heretofore stated. If a tempest springs up, or damage from any other quarter threatens, he is certainly to use all proper exertions to prevent loss, and when an injury has been sustained by a cause beyond his power to prevent, to use every means to prevent further injury. A damage may result to the bailment after an injury received from inevitable accident, which, although it would not have happened had not the accident occurred, yet was not necessarily the result of that accident, but might have been avoided by proper efforts on the part of the carrier. For such damage he is

undoubtedly responsible, and he cannot charge it to the inevitable accident. It is the result of his own negligence. In the case of Charleston and Col, S. B. *v.* Bason, 1 Harper, 262, a boat grounded on an inland passage to Charleston, from a reflux of the tide, and fell over, when the bilge-water ran into the cabin and injured a box of books belonging to the plaintiff. Richardson, J., said: "Admitting the grounding to have been accidental and unavoidable, and the carrier in no fault, yet the moment the boat heeled, the bilge-water was returned towards the stern; and this the carrier was bound to know, and remove the cargo there stored. The books in question, being in the cabin, could easily have been removed. The carrier is liable for bad storage and default in good keeping. The injury therefore was through negligence, and does not come within the exception of the bill of lading."

The true question then, in such cases, must be — is the damage the result of the accident; or is it, or any portion of it, attributable to the negligence of the carrier? The defendant was certainly not responsible for the damage the wheat received by the storm; but if, after the storm passed, the wheat, or any portion of it, was suffered to remain in the water, which could have been baled out, or when it could have been removed to another part of the boat, without interference with the rights of other shippers or passengers, a loss happening for want of such removal of the wheat or the water is properly chargeable to the boat. The loss thus produced is not the effect of the accident, but is attributable to the negligence of the officers and crew of the boat. It is the duty of the carrier to take all possible care of the freight intrusted to him. His employment is to transport goods and passengers with speed and care. But to impose upon him the burden of repairing the effects of accidents for which he is not responsible, is requiring of him a task he has never undertaken, and for which, we may presume, he has no special skill. The instruction given by the Court of Common Pleas imposed upon the carrier this additional task. The officers of the "Lynx" were required to *dry* the wheat which had been wet by a storm, and to use all possible means to effect this object. It will be seen at once that the task of drying several thousand bushels of wheat is not a light one, and if all the means which skill and science and labor can bestow are to be used in this process; the business of the common carrier is lost sight of.

Is the master of the boat to withdraw his crew from their ordinary employments in the prosecution of the voyage, and employ them in this onerous and tedious business, totally foreign to his general duty, and utterly destructive it may be of the interests of the owners, insurers, and other shippers? Would it not be most beneficial to all parties concerned, that he should proceed to his port of destination with all possible despatch, where the owners or consignees of the wheat could take the necessary measures for restor-

ing it to a sound condition? In the case we have cited from South Carolina, it was not hinted in the opinion that it was any part of the duty of the master of the steamboat to dry the books after they had been wet by the bilge-water; but he was held responsible for not removing them before the water reached them. Suppose the case of a large assortment of dry goods shipped on one of our western boats. The boat is snagged, and the goods are damaged by the water. Shall the master and crew be obliged to open the boxes, unfold the packages and pieces, and by means of artificial or natural heat undertake the tedious process of drying the goods?

The case of Bird *v.* Cromwell, 1 Mo. R. 81, certainly goes very far to sustain the instruction given in this case. That case was decided in 1821, and the accident which gave rise to the suit occurred on a barge navigating the Mississippi between New Orleans and St. Louis. A quantity of coffee, how much is not stated, was shipped on this barge at New Orleans, and became wet and damaged by an inevitable accident. The court held that it was the duty of the master of the barge to use all possible exertions to dry the coffee. It is impossible to conjecture, from the opinion, what character and degree of exertions the court had in view in giving this instruction. The facts of the case may have authorized a verdict against the boat or her owners, but the instruction approved by the court in its unqualified sense was certainly imposing an extraordinary duty upon common carriers. Much consideration is no doubt due to the character of the navigation in which the carrier is engaged. Whilst the general principles which govern the conduct of common carriers in ocean navigation have been applied to the navigation of our western waters, there are cases and circumstances in which the duties of these respective classes of carriers obviously vary. So, also, the navigation of the Mississippi by keels and barges in 1820 may have been attended with different duties from those devolving on the owners and officers of steamboats at the present day. When it required from six weeks to two months to make the voyage from New Orleans to St. Louis, the officers and crew of the barge thus slowly impelled by human power, and having no intermediate points of trade, may have been subjected by the custom of the trade to a greater variety of duties than would now be held to devolve upon the class of navigators which has succeeded them. The abstract principle, however, avowed in this opinion of Bird *v.* Cromwell, we cannot consider as applicable to the circumstances of the present case.

The other judges concurring, the judgment is reversed, and the cause remanded.

BEARD *v.* ILLINOIS CENTRAL R. CO.

79 Iowa, 578. 1890.

Action to recover damages for injury sustained by plaintiffs from the negligence of defendant in transporting a car-load of butter, which it had received from an intermediate carrier, whereby the butter was greatly injured. There was a verdict and judgment for plaintiff. Defendant appeals.

Beck, J. I. The plaintiff delivered to the Burlington, Cedar Rapids & Northern Railway Company, at West Union, in two consignments, a large quantity of butter for transportation to New Orleans. The facts as to both separate consignments are identical. In the further statement of facts they will be referred to as but one transaction. The butter was put in refrigerator cars by the company first receiving it and was transported therein over connecting roads to St. Louis, where it was transferred by drays across the river, and delivered to the St. Louis, Alton & Terre Haute Railway Company, known as the "Cairo Short Line," and put in a common box car, and a lined fruit car, each of which was sealed, as is usually done, and sent on the same day to Duquoin, Illinois, and delivered to defendant, which transported it to New Orleans, in the same cars. The butter was not examined by defendant, and no attempt was made to ascertain its condition, on the probability that it could or would not be transported in the cars, without injury, to New Orleans. The Cairo Short Line Company billed the butter to New Orleans at a rate of freight charges for common cars. It appears that the consignment took the usual course of transaction between defendant and the Cairo Short Line, at Duquoin. It is not shown that plaintiff, or the initial or connecting carrier, made any demand of defendant or the Cairo Short Line Company for a refrigerator car, or for the protection of the butter from the effects of heat by the use of ice in the common car in which it was transported, and it is not shown that plaintiff, or the initial carrier, or the connecting companies to St. Louis, had any notice or information in any way, directly or indirectly, of the shipment of the butter without protection from the effects of the heat, nor did they have any notice or information of the practice and course of business adopted by defendant and the Cairo Short Line at Duquoin. We are required to determine whether, under the law upon these facts, the defendant is liable. The discussion of this question will dispose of certain objections made by the counsel of defendant to the rulings of the court below upon instructions and admissions of evidence.

II. We will proceed to inquire as to the duty of defendant upon receiving the butter in a car from the Cairo Short Line for trans-

portation to New Orleans, without directions or instructions as to the character of the car in which it should be carried. A carrier's duty is not limited to the transportation of goods delivered for carriage. He must exercise such diligence as is required by law to protect the goods from destruction and injury resulting from conditions which, in the exercise of due care, may be averted or counteracted. He must guard the goods from destruction or injury by the elements; from the effects of delays; indeed, from every source of injury which he may avert, and which, in the exercise of care and ordinary intelligence, may be known or anticipated. Unknown causes, or those which are inherent in the nature of the goods, and cannot be, in the exercise of diligence, averted, will not render the carrier liable. The nature of the goods must be considered in determining the carrier's duty. Some metals may be transported in open cars. Many articles of commerce, when transported, must be protected from rain, sunshine, and heat, and must have cars fitted for their safe transportation. Live animals must have food and water, when the distance of transportation demands it. Fruit, and some other perishable articles, must be carried with expedition and protection from frost. So the carrier must attend to the character of the goods he transports. He is informed thereof by inspection of the freight-bills, or by other papers accompanying the shipment.

In the case before us the marks on the packages and the way-bill disclosed that the subject of shipment was butter. The employees of defendant were endowed with intelligence which taught them that the season was summer, when warm weather prevailed; that butter, in common cars, would be greatly injured by the ordinary heat of the climate; and that the butter, as it approached its destination, would be subject, by reason of the change of latitude, to greatly increased heat from the weather. All these things are familiarly known to all men. Surely, the law will presume that defendant's employees had full knowledge thereof. The law required the defendant, having received the perishable cargo involved in this suit, to exercise the care and diligence necessary to protect it; and, if improved cars for the transportation of articles of commerce liable to injury from heat were in use, it was defendant's duty to use such cars in carrying the butter. These views are supported by the following, among other cases: Hewett *v.* Railway Co., 63 Iowa, 611; Sager *v.* Railway Co., 31 Me. 228; Hawkins *v.* Railway Co., 17 Mich. 62; 18 Mich. 427; Railway Co. *v.* Pratt, 22 Wall. 123; Wing *v.* Railway Co., 1 Hilt. 241; Merchants' Dispatch & Trans. Co. *v.* Cornforth, 3 Colo. 280. As to the duty of defendant to use cars so constructed and used as to avoid injury from heat, see Hutch. Carr., sec. 294; Boscowitz *v.* Express Co., 93 Ill. 525; Steinway *v.* Railway Co., 43 N. Y. 123.

III. But it is said: (1) That defendant did not have refrigerator cars which it could have used on the day it received the butter;

(2) that the cars were sealed; (3) that it was accustomed to haul the cars received from the Cairo Short Line without changing the cargo. We may here assume that defendant will be excused from using refrigerator cars. But it is shown that the butter could have been carried safely by the use of ice in the box cars. It was defendant's duty to use it. But, having accepted the butter for transportation, defendant cannot escape liability for not safely transporting it, on the ground that it did not have cars sufficient for that purpose. Railway Co. *v.* Swift, 12 Wall. 262; Helliwell *v.* Railway Co., 7 Fed. Rep. 76; Paramore *v.* Railway Co., 53 Ga. 385. The sealing of the car was not to protect it from defendant, the carrier having it under control. Surely, if it was necessary for the protection of the goods, defendant had full power to enter the car, and failure to exercise the power was negligence. Dixon *v.* Railway Co., 74 N. C. 538. The custom of the defendant and Cairo Short Line cannot be invoked to protect one or both from negligence causing destruction to goods transported by them. A custom to take cars without changing the goods in them, when their safety demanded it, would be a custom based upon negligence, and cannot be regarded or enforced. Hamilton *v.* Railway Co., 36 Iowa, 31; Allen *v.* Railway Co., 64 Iowa, 95.

IV. It is said that the rate of charges, as shown by the way-bill, was for common cars, and the defendant, therefore, undertook to furnish no other kind. If the freight charges fixed in the way-bill do not express a contract that the butter may be transported so as to destroy its value, and that the carrier is excused from the exercise of the care required of him by law, we think the freight charges in no case will limit the care to be exercised by the carrier, and restrict his liability. The defendant was not restricted, by the rate of freight charges named in the way-bill, from claiming and enforcing the payment of a just compensation for charges incurred on account of outlays made in order to safely transport the goods. Sumner *v.* Railway Association, 7 Baxt. 345. Many of the rulings of the District Court upon the admission of evidence and instructions objected to by defendant, are in accord with the views we have expressed.

V. Evidence was admitted, against defendant's objection, tending to show that a custom prevailed among carriers by railroads to put butter into cold storage, when refrigerator cars were not ready to receive it. This evidence was objected to, on the ground that the petition contained no allegation of negligence by reason of the failure of defendant to put the butter into cold storage. But the petition does charge negligence on the part of defendant in not taking proper precautions to preserve the butter. The evidence tends to show what precautions ought to have been taken in this case. Besides, the evidence serves to show that defendant's excuse for sending the butter in the common car, and for not retaining it

until a refrigerator car on defendant's road came along, is not sufficient. It is shown that such a car was run on defendant's trains on two or three days each week.

VI. The Superior Court, in the seventh instruction given, directed the jury that they could infer that the butter was in good order when received by defendant, from the fact that it was shipped in good condition, in a refrigerator car, for St. Louis. Of this instruction defendant complains. It is correct. The presumption arises that goods shipped in good order continue in that condition when in the hands of a connecting carrier. The burden rests on such carrier to show that they were not in good condition when received by him. Hutch. on Carr., sec. 761; Shriver *v.* Railway Co., 24 Minn. 506 [414]; Leo *v.* Railway Co., 30 Minn. 438; Laughlin *v.* Railway Co., 28 Wis. 204; Dixon *v.* Railway Co., 74 N. C. 538; Paramore *v.* Railway Co., 53 Ga. 385.

VII. The defendant, in its answer, set up as a defence that plaintiffs had fully compromised this claim for loss of the butter with preceding connecting carriers, transporting the butter to defendant. The court withdrew the issue upon this defence from the jury, on the ground that there was no evidence supporting the defence. Of this ruling the defendant now complains. The court, we think, ruled rightly. The evidence totally fails to show a settlement. The most that could be said is that the evidence shows propositions for settlements, and agreements to settle. But it is not shown, as is alleged in defendant's answer, that there was in fact a settlement and payment thereon, and a discharge of the claim. The action of the court in this regard is correct. The foregoing discussion disposes of all the questions requiring consideration in this opinion. The judgment of the District Court is

Affirmed.

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5. LIMITATION OF LIABILITY.

a. *What valid.*

GIBBON *v.* PAYNTON.

King's Bench. 4 Burr. 2298. 1769.

This was an action against the Birmingham stagecoachman, for £100 in money sent from Birmingham to London by his coach, and lost. It was hid in hay, in an old nail-bag. The bag and the hay arrived safe; but the money was gone. The coachman had inserted an advertisement in a Birmingham newspaper, with a *nota bene*, "that the coachman would not be answerable for money or jewels

or other valuable goods, unless he had notice that it was money or jewels or valuable goods that was delivered to him to be carried." He had also distributed hand-bills of the same import. It was notorious in that country that the price of carrying money from Birmingham to London was threepence in the pound. The plaintiff was a dealer at Birmingham, and had frequently sent goods from thence. It was proved that he had been used, for a year and a half, to read the newspaper in which this advertisement was published; though it could not be proved that he had ever actually read or seen the individual paper wherein it was inserted. A letter of the plaintiff's was also produced, from whence it manifestly appeared that he knew the course of this trade, and that money was not carried from that place to London at the common and ordinary price of the carriage of other goods. And it likewise appeared from this letter that he was conscious that he could not recover, by reason of this concealment. The jury found a verdict for the defendant.

Mr. *Wallace*, on behalf of the plaintiff, moved (on Thursday, 26th January, 1769) for a new trial, and obtained a rule to show cause: which rule he now enforced, and was supported by Mr. Hotham. They insisted that the coachman was answerable, though he did not know that it was money. A carrier is always answerable, unless he accepts the goods specially; but the circumstances of this case, they said, do not amount to a special acceptance. He made no inquiry or objection; therefore he is answerable. It is incumbent upon him to see that he is not cheated. He is bound to receive the goods, and must run the risk. If the goods are lost by negligence, or even if he is robbed, he is liable to answer for them. If the trader deceives him, he may have an action against the trader, for this deceit. In proof of their arguments and assertions, they cited the following cases.

Aleyn, 93; Kenrig *v.* Eggleston, 1 Ventr. 238, a like case cited by Hale, in delivering the reasons of the resolution in the case of Morse *v.* Slue [**114**]; Coggs *v.* Barnard, in 1 Salk. 26; 3 Salk. 11, 268, and Holt, 13, 131, 528; Carthew, 485. Sir Joseph Tyly *et al.* *v.* Morrice, 2 Shower, 81; Bastard *v.* Bastard, 1 Stra., 145 [**88**]; Titchburne *v.* White, at Guildhall; where Lord Chief Justice King held "that if a box is delivered generally to a carrier, and he accepts it, he is answerable, though the party did not tell him there is money in it."

Mr. *Dunning* (Solicitor General) and Mr. *Mansfield* argued on behalf of the defendant, against a new trial. They treated this conduct of the plaintiff as a fraud and deception upon the defendant. A carrier may accept specially: this man has done so. The advertisement is explicit against being answerable for money, without notice. This money was never fairly and properly intrusted to the defendant; and a carrier shall not be liable, where he is imposed upon; which is the present case. Lord Mansfield distinguished

between the case of a common carrier and that of a bailee. The latter is only obliged to keep the goods with as much diligence and caution as he would keep his own; but a common carrier, in respect of the premium he is to receive, runs the risk of them, and must make good the loss, though it happen without any fault in him; the reward making him answerable for their safe delivery.

This action is brought against the defendant upon the foot of being a common carrier. His warranty and insurance is in respect of the reward he is to receive; and the reward ought to be proportionable to the risk. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards or other methods of security; and therefore he ought, in reason and justice, to have a greater reward. Consequently, if the owner of the goods has been guilty of a fraud upon the carrier, such fraud ought to excuse the carrier. And here the owner was guilty of a fraud upon him: the proof of it is over abundant. The plaintiff is a dealer at Birmingham. The price of the carriage of money from thence is notorious in that place: it is the rule of every carrier there. It is fairly presumed that a man conversant in a trade knows the terms of it. Therefore the jury were in the right, in presuming that this man knew it. The advertisement and handbills were circumstances proper to be left to the jury. The plaintiff's having been used, for a year and a half, to read this newspaper is a strong circumstance for the jury to ground a presumption that he knew of the advertisement. Then his own letter strongly infers his consciousness of his own fraud, and that he meant to cheat the carrier of his hire. Therefore I entirely agree with the jury in their verdict. And if he has been guilty of a fraud, how can he recover? *Ex dolo malo non oritur actio.*

As to cases cited — that of Kenrig *v.* Eggleston, in Aleyn, 93, was £100, in a box delivered to a carrier; the plaintiff telling him only "that there was a book and tobacco in the box;" and Roll directed that although the plaintiff did tell him of some things in the box only, and not of the money, yet he must answer for it; for he need not tell the carrier all the particulars in the box; but it must come on the carrier's part to make special acceptance. But in respect of the intended cheat to the carrier, he told the jury they might consider him in damages: notwithstanding which, the jury gave £97 against the carrier, for the money only (the other things being of no considerable value), abating £3 only for carriage. *Quod durum videtur — circumstantibus.* Now I own that I should have thought this a fraud; and I should have agreed in opinion with the *circumstantes*, which seems to have been also the opinion of the reporter.

So in the case cited by Hale, in 1 Ventris, 238, of a box brought to a carrier, with a great sum of money in it, and upon the carrier's demanding of the owner "what was in it," he answered "that it was filled with silks and such like goods of mean value;" upon which,

the carrier took it, and was robbed; and resolved "that he was liable." But (says the case) if the carrier had told the owner "that it was a dangerous time; and if there were money in it, he durst not take charge of it;" and the owner had answered as before; this matter would have excused the carrier. In this case also, I own that I should have thought the carrier excused, although he had not expressly proposed a caution against being answerable for money: for it was artfully concealed from him that there was any money in the box.

The case of Sir Joseph Tyly and Others against Morrice, in Carthew, 485, was determined upon the true principles — "that the carrier was liable only for what he was fairly told of." Two bags were delivered to him, sealed up, said to contain £200, and a receipt taken accordingly, with a promise "to deliver them to T. Davis; he to pay 10*s.* per cent for carriage and risk." The carrier was robbed. The Chief Justice was of opinion that he should answer for no more than £200, "because there was a particular undertaking by the carrier for the carriage of £200 only; and his reward was to extend no further than that sum; and 't is the reward that makes the carrier answerable: and since the plaintiffs had taken this course to defraud the carrier of his reward, they had thereby barred themselves of that remedy which is founded only on the reward." So the jury were (in that case) directed to find for the defendant.

For these reasons, his Lordship was of opinion, in the present case, that the plaintiff ought not to recover.

Mr. Justice Yates held that a carrier may make a special acceptance; and that this was a special acceptance.

By the general custom of the realm, a common carrier insures the goods, at all events; and it is right and reasonable that he should do so; but he may make a special contract, or he may refuse to contract, in extraordinary cases, but upon extraordinary terms. And certainly, the party undertaking ought to be apprised what it is that he undertakes; and then he will or at least may take proper care. But he ought not to be answerable where he is deceived. Here he was deceived: the money was hid in an old nail-bag; and it was concealed from him that it was money. The plaintiff's own letter shows that he knew the course of this trade, and that money was not in that place carried at the common ordinary price of carrying other things. And if he was apprised of the defendant's advertisement, that might be equivalent to personal communication of the carrier's refusal to be answerable for money not notified to him; and this was left to the jury.

Mr. Justice Aston, who tried the cause, said he had no doubt about the justice of the case: his difficulty had only arisen from the cases and authorities which had been now mentioned; which put him upon more caution in admitting the evidence. But it appeared to be notorious in the country where this transaction happened, that

the price of carrying money from thence to London was threepence in the pound; and it manifestly appeared that this was money sent under a concealment of its being money. The true principle of carrier's being answerable is the reward. And a higher price ought, in conscience, to be paid him for the insurance of money, jewels, and valuable things, than for insuring common goods of small value. And here, though it was not directly and strictly brought home to the plaintiff that he had a clear certain knowledge of the defendant's advertisements and hand-bills, yet it was highly probable that he must have known of them; and his own letter showed his being conscious that he could not recover, by reason of the concealment. Therefore I think the verdict against him ought to stand.

Mr. Justice WILLIS concurred in the same opinion.

Per Cur', unanimously — Rule discharged.

HARRIS *v.* PACKWOOD.

Common Pleas. 3 Taunt. 264. 1810.

THIS was an action brought against the defendants, who were common carriers, to recover the value of forty-six pounds of silk, delivered to them in London, to be carried from thence by their wagon to Coventry, and never received there by the consignees. Upon the trial, at Guildhall, at the sittings after the last Trinity Term, before LAWRENCE, J., it was proved that the goods were delivered and booked at the warehouse in London, from whence the wagon set out, and that they were seen safe at Market Street, in the road to Coventry, but that they never arrived at Coventry; that their value was £126; that the wagon by which they were carried formerly was built with bows, and when the bows were closed, it was very difficult to take a large parcel out of the loaded wagon, but that for some time past these bows had been taken off and discontinued, in order to make it more easy to load the wagon, and to enable it to receive a larger load, but that this alteration rendered it an easier matter to take out a parcel. The wagon had also formerly been guarded, but there had been no guard to attend it for the last two years. The wagon usually arrived at Towcester at two o'clock in the morning, and remained there until twelve at noon, in a yard, under the wall. It was the wagoner's practice on his arrival there to call up the innkeeper, and to go to bed himself. The defendant relied upon his having published an advertisement, in November, 1808, which he had sent round to all the silk-traders who then used his wagon, and amongst others to the plaintiff, announcing that he would not be accountable for any package whatsoever,

above the value of £20, unless entered, and an insurance paid, over and above the price charged for carriage, according to their value, and that no such insurance had been paid in this case; the plaintiff answered this by proving a former advertisement circulated by the defendant containing special terms for the carriage of silk, viz., 9*s.* 4*d.* per cwt., while for ordinary bulky articles he charged 6*s.* only, and he contended that the higher price of 9*s.* 4*d.* per cwt. included the premium of insurance. It was admitted that if the goods had been delivered, the plaintiff would have paid for them at the rate of 9*s.* 4*d.* per cwt. Some other persons paid a halfpenny per lb. of silk, besides the price of carriage, for insurance.

Shepherd, Sergt., for the defendant, contended that the claim for insurance meant the same thing as if the defendants had said, if goods are of a certain value, we must receive a halfpenny more in every pound of their value for carrying them; and as the plaintiff had not engaged to pay that, he could not make the defendant in any wise responsible for the loss.

Lawrence, J., thought, that as a specific sum was paid for the carriage, and something was to be paid over and above the carriage for insurance, the word insurance must be applied to those risks against which a carrier is bound by law to insure, *qua* insurer, as fire, robbers, armed force, and the like, and that the sum required for insurance must be received as the price of guarding against those accidents; but that without the payment of any such insurance, he was still bound to guard against loss by exposure, carelessness, driving into the river, or the like; otherwise a carrier might receive the price of carrying the goods, and nevertheless be as careless as he pleased: in this case it did not appear that the parcel was not lost through mere negligence; there was good reason why a carrier should be made acquainted with the value of the goods committed to him, that he might take the greater precaution against fire, or take greater force to resist felons; but here the defendant was satisfied with the price of the carriage, and undertook to carry for that price, but claimed something further for insurance: what does that mean? surely not for insurance against his own default of duty! It was incumbent, therefore, on the defendant to show that he took reasonable care of them, not on the plaintiff to prove a negative, and that the defendant took no care of them. The jury, under his direction, found a verdict for the plaintiff, for £126 damages, with liberty reserved to the defendants to move for a new trial, or nonsuit, as they might be advised.

Shepherd, Sergt., having, accordingly, in the present term, obtained a rule *nisi* to enter a nonsuit,

Best and *Vaughan*, Sergts., on this day, showed cause; when Lawrence, J., upon reporting the evidence, said, that at the time of the trial he had not read the case of Nicholson *v.* Willan, 5 East, 507. In that case there was no distinction in the advertisement

between the price of carriage, and the price of insurance, but the distinction was taken in argument, and relied on: the court, however, held the defendant not liable. *Best* contended that this difference in the two advertisements materially distinguished the present case from that of Nicholson *v.* Willan: here the contract is, that a certain price shall be paid for carriage, and an insurance over and above that: therefore, inasmuch as the contract is to be taken most strongly against the party who words it, the price of carriage is the compensation for the labor and diligence to be bestowed, and the price of insurance is the price for covering those risks which are purely accidental. [Lawrence, J. In Nicholson *v.* Willan it was very doubtful whether the goods had gone by any carriage.] By the statutes 3 & 4 W. & M. c. 12, and 21 G. II. c. 28, the price of carriage is to be fixed by the magistrates at their quarter sessions, and the latter statute inflicts a penalty of £5 upon carriers who bring goods to London, for taking a higher price than is allowed by the sessions of the county from which they set out: and this statute is not, as it has been supposed, repealed by any subsequent act: but if these statutes be now in force, it is impossible that a carrier can refuse to carry goods for the price which the sessions fix. [Heath, J. It does not appear that any order of sessions has been made in the present case.] The case of Oppenheim *v.* Russell, 3 Bos. & Pull. 42, contradicts the position, that though a carrier cannot get rid of his whole responsibility, he may vary it in any shape that he pleases. All four of the judges there held, that a carrier could not create a lien upon the goods delivered to him for his general balance, because he was bound by the law of the country to receive and carry goods for a reasonable reward. [Lawrence, J. That was a lien as against the owner of the goods to whom they were consigned: the court did not say that the carrier could not have a general lien against the party sending the goods, if he were also the owner.] But as the law binds the carrier equally to insure as to carry, if he cannot prescribe the terms on which he will carry, so neither can he prescribe the terms on which he will insure; or, if he may, yet it is not competent to him to require payment for an insurance against his own negligence, by which, so far as appeared, this loss was occasioned. Nay, more, it was the effect of his own cupidity; for the wagon formerly was advertised as going with a light and a guard, and inasmuch as the defendant had never publicly countermanded that advertisement, the plaintiff had a right to suppose that it was still lighted and guarded; he was also bound to have a wagon secure from theft, to which he has rendered it more liable by taking off the bows, yet without giving any notice of the alteration he continued to receive the same rate of carriage as he did when the bows were there, and the wagon guarded, which is a gross fraud. The non-payment of the price of insurance cannot exonerate the carrier from the duty of ordinary diligence and care; if he wishes to avail him-

self of his renunciation of the character of insurer, he must show that the loss happened by an insurable accident, and not by that degree of negligence against which every man who undertakes to do anything for hire, is bound to guard. The case of Tyly *v.* Morrice, Carth. 485, and all the old cases, are cases where a deceit is put upon the carrier as to the value of the goods, and he is relieved against it. Lane *v.* Cotton, Salk. 18, Lord Holt, Ch. J., says, "It is a hard thing to charge a carrier; but if he should not be charged, he might keep a correspondence with thieves, and cheat the owner of his goods, and he should never be able to prove it." This is not only sound law, but excellent sense, as well as great authority. Lyon *v.* Mells, 5 East, 430. The carrier had given notice "that he would not be liable for *any* damage which should happen to a cargo, unless it were occasioned by the want of ordinary care in the master or crew of the vessel, and in such case, he would pay £10 per cent upon the loss, provided it did not exceed the value of the vessel and freight; and that persons desirous of having their goods carried free of any risk might have the same so carried by entering into an agreement for the payment of extra freight, proportionable to the accepted responsibility." Yet where a loss happened by the vessel not being seaworthy, the owner was very properly held liable to the whole extent of the loss, though it was not one of the events in which he consented to be in any case nor to any amount liable. Ellis *v.* Turner, 8 Term Rep. 532. The defendant endeavored to avail himself of a similar notice, but the master of the vessel having carried the goods beyond the place where they were to be delivered, and at which she touched and delivered a part, and the ship being lost on the ulterior voyage, it was held that the owner was liable beyond the £10 per cent for the full amount of the loss. It would be carrying the matter much further than the cases have hitherto gone, to say that because a person does not insure, therefore he shall have no remedy for a loss which is not occasioned by insurable perils. The contract in this case is not very explicit, but it is to be expounded with at least as much liberality towards the public as towards the carrier. If, then, it had been expressly worded that the defendant would not be liable for any loss incurred by the negligence of himself or his servants, unless an insurance over and above the charge for carriage were paid, would not the court reject those words, and say that he should not require a premium for insurance against losses which might happen for the want of that care which is paid for in the price of carriage?

Shepherd, contra. The cases of Lyon *v.* Mells, and Ellis *v.* Turner, are not applicable; the first was decided on the ground of gross negligence in the carrier, who had accepted the goods to carry, not upon the ground that he might not limit his responsibility. In the second case the goods were not lost in the course of the carriage which the defendant had undertaken, but he had gone beyond the

point where they were to be delivered. If the law that carriers may limit their responsibility be wrong, the legislature alone can alter it; but it probably is the wisest policy to leave things to find their own level; if the law fixed the same price for goods of the highest as of the least value, no one would be a carrier. To show that the law had long been so established, he cited Kenrick *v.* Eggleston, Aleyn, 93; Tyly *v.* Morrice; Gibbon *v.* Paynton, 4 Burr. 2298 [160]; Clay *v.* Willan, 1 H. Bl. 298; Izet *v.* Mountain, 4 East, 371. A warehouse-keeper may be answerable for a loss by fire, if the loss happens by his especial gross negligence; but in general, a warehouseman is not answerable for that species of loss. So a carrier, like any other person, may be liable for gross negligence, but if he makes an especial acceptance of the goods, he is not liable unless the plaintiff shows that he is guilty of this gross negligence. It would be impossible for the defendant ever to prove the negative, that he was not guilty of gross negligence. Rothwell *v.* Davis, B. R. sittings after the last Easter Term, before Bayley, J., the carrier gave notice that he would not be answerable "unless the goods were entered, and properly paid for." Nothing was paid but the booking, and it was held that the plaintiff could not recover. So, in this case, the carriers require the goods to be "entered according to their value," which is not done; so that even if all that relates to the insurance be laid out of the question, still the plaintiff cannot recover. [LAWRENCE, J. No; the words are "will not be answerable unless entered;" he does not say "entered according to the value," but that the insurance shall be according to the value.] Clay *v.* Willan is in point, where the words were, that he would not be answerable for goods above five pounds' value unless entered as such, and a penny insurance paid for each pound value. If the carrier were to say he would not be accountable for any of his acts, commissive or omissive, although they amount to gross negligence, that would be an exception of the very thing, and the court would not permit such a contract; but that is not this case.

MANSFIELD, Ch. J. These cases, so decided, seem to have decided the present. However we may wish the law to be, we cannot make it different than as we find it. In looking into the books, we find the special acceptance much older than I had supposed it to be. And it leads to great frauds, for on account of the number of persons always attending about these open wagon-yards and offices, every person standing around is apprised that this or that parcel contains watches or jewels to the amount of many hundred pounds; this is a great inconvenience, but however inconvenient it is, it seems that from the days of Aleyn down to this hour, the cases have again and again decided that the liability of a carrier may be so restrained; then the question is, whether this loss is within the contract that has been made, and it seems, according to one or two of the cases, [and it is so;] for the bonds have been of a very suspicious

nature; in one case, the parcel seems to have been lost before it left the yard; but, however, as there was no proof here of express negligence, it seems that there must be a rule absolute for a nonsuit. It would, however, be useless to pass any such statutes to limit the price of carriage if a carrier be at liberty to charge what he pleases: the price must be reasonable.

Heath, J., was of the same opinion. In some wagons there are particular safe places in the very centre, to deposit jewels and articles of superior value, when they are known to be such.

Lawrence, J. I was not aware of the cases which have been made use of, for the word "insurance." It is a very foolish word, and if the defendants had said, we will not in any case be liable for the goods, unless a certain sum is paid, according to the value, it would have been clear and intelligible; and there is nothing unreasonable in a carrier requiring a greater sum, when he carries goods of greater value, for he is to be paid not only for his labor in carrying, but for the risk which he runs, which is greater in proportion to the value of the goods. I would not, however, have it understood that carriers are at liberty by law to charge whatever they please; a carrier is liable by law to carry everything which is brought to him for a reasonable sum to be paid for the same carriage, and not to extort what he will.

Chambre, J. I am of the same opinion. The defendants say they will not be insurers, we will not enter into that situation at all, unless we are paid according to the value. Therefore there must be a nonsuit. *Rule absolute.*

RILEY *v.* HORNE.

Common Pleas. 5 Bing. 217. 1828.

Case against the defendants as common carriers, for negligence in losing goods intrusted to them, to be safely conveyed by them from Kettering to London, and there to be delivered to the plaintiffs for reward to the defendants in that behalf. Plea, not guilty.

At the trial, before Best, C. J., London sittings after Hilary Term, 1828, it appeared that the plaintiffs were silk-weavers residing in London, and carrying on business there and at Kettering; that the defendants' coach ran from the George and Blue Boar, London, to Kettering and back; that at the George and Blue Boar there was a notice, that the proprietors of coaches which set out from that office would not be responsible for goods above the value of £5, unless entered as such, and paid for accordingly; that the plaintiffs were aware of this notice, and in the habit of sending goods up and down by the defendants' coach; that the goods in question, silks

to the value of £46, were delivered to the defendants by the plaintiffs' servant, at the defendants' office at Kettering, to be conveyed to London, and that the servant saw no such notice in the office at Kettering; that the goods were never delivered to the plaintiffs.

The learned Chief Justice, thinking the notice in the office at the George and Blue Boar, of which the plaintiffs were cognizant, applied only to the journey out to Kettering, and not to the journey back, a verdict was found for the plaintiffs with leave for the defendants to move to set it aside.

Best, C. J. In a state of society such as that we live in, — in which we are supplied with the necessaries and conveniences of life by an interchange of the produce of the soil and industry of every part of the world, — so much property must be intrusted to carriers that it is of great importance that the laws relating to the carriage of goods should be rendered simple and intelligible; and that they should be such as to provide for the safe conveyance of property, and at the same time protect the carrier against risks, the extent of which he cannot know, and, therefore, cannot determine what precautions are proper for his security.

. . . . . .

When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves.

To give due security to property, the law has added to that responsibility of a carrier which immediately rises out of his contract to carry for a reward — namely, that of taking all reasonable care of it — the responsibility of an insurer.

From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, — namely, the act of God and the king's enemies.

As the law makes the carrier an insurer, and as the goods he carries may be injured or destroyed by many accidents, against which no care on the part of the carrier can protect them, he is as much entitled to be paid a premium for his insurance of their delivery at the place of their destination, as for the labor and expense of carrying them there. Indeed, besides the risk that he runs, his attention becomes more anxious, and his journey is more expensive, in proportion to the value of his load. If he has things of great value contained in such small packages as to be objects of theft or embezzlement, a stronger and more vigilant guard is

required than when he carries articles not easily removed, and which offer less temptation to dishonesty. He must take what is offered to him to carry to the place to which he undertakes to convey goods, if he has room for it in his carriage. The loss of one single package might ruin him.

By means of negotiable bills, immense value is now compressed into a very small compass. Parcels containing these bills are continually sent by common carriers. As the law compels carriers to undertake for the security of what they carry, it would be most unjust if it did not afford them the means of knowing the extent of their risk. Other insurers (whether they divide the risk, which they generally do, amongst several different persons, or one insurer undertakes for the insurance of the whole) always have the amount of what they are to answer for specified in the policy of insurance.

If the extent of risk is ascertained in cases in which persons are not obliged to insure, and if they do insure may fix their own rate of premium, there is greater reason for ascertaining it where one is compelled to become an insurer, and can only charge what the magistrates in sessions, if they think proper to settle the rates of carriage, will allow under the statute of William and Mary, and where no such rates are made, what a jury shall think reasonable. It would be inconvenient, perhaps impossible, to have a formal contract made for the carriage of every parcel in which the value of the parcel should be specified, as well as the price to be paid for the carriage. But it would add very little to the labor of the book-keeper if he entered the value of each package, and gave the person who brought it a written memorandum of such entry, like the slips now made on an agreement for a policy of insurance.

The giving of such memorandums will entirely put an end to the litigation which the notices of carriers now give occasion to, and would make the practice of carriers, as nearly as circumstances will permit, conformable to that of all other insurers. Perhaps such memoranda might bring the parties within the reach of the stamp laws; and the apprehension of this may have prevented carriers from adopting a practice so effectual for their security, and have driven them to the expedient of giving notices that they will not be answerable beyond a certain sum, unless the parcels are entered and paid for as parcels of value.

In Batson *v.* Donovan, 4 B. & A. 21, the Court of King's Bench considered a notice of this sort, the knowledge of which was brought home to the party sending goods, as equivalent to a request on the part of the carrier to know the value, and that it made it the duty of the owner of the goods to apprise the carrier that the parcel was of value.

The legislature would probably think, if its attention were called to the subject, that a stamp duty on contracts relative to inland

carriage would be a very heavy and very inconvenient tax, and would remove the objection to written evidence of such contracts.

A carrier has a right to know the value and quality of what he is required to carry. If the owner of the goods will not tell him what his goods are and what they are worth, the carrier may refuse to take charge of them; but if he does take charge of them, he waives his right to know their contents and value. It is the interest of the owner of goods to give a true account of their value to a carrier, as in the event of a loss he cannot recover more than the amount of what he has told the carrier they were worth; and he cannot recover more than their real worth, whatever value he may have put on them when he delivered them to the carrier.

It was decided in Gibbon *v.* Paynton, 4 Burr. 2298 [**160**] that any artifice made use of to induce a carrier to think that a parcel of jewelry contained only things of small value, would prevent the owner from recovering for the loss of his parcel.

In Kenrig *v.* Eggleston, Al. 93, it was held that the owner was not required to state all the contents of the parcel, but it was for the carriers to make a special acceptance. In Tyly and Others *v.* Morrice, Carth. 485, in which the preceding case is recognized and confirmed, it is said that the true principle is, that the carrier is only liable for what he is fairly told of. In Titchburne *v.* White, Str. 145, it was determined that a carrier is answerable for money, although he was not told that the box delivered to him contained any money, unless he was told that the box did *not* contain money, or he accepted it on the condition that it did not contain money.

It may be collected from these authorities, that it is the duty of the carrier to inquire of the owner as to the value of his goods, and if he neglects to make such inquiry, or to make a special acceptance, and cannot prove knowledge of a notice limiting his responsibility, he is responsible for the full value of the goods, however great it may be. This is a convenient rule; it imposes no difficulty on the carrier. He knows his own business, and the laws relative to it. Many persons, who have occasion to send their goods by carriers, are entirely ignorant of what they ought to do to insure their goods. Justice and policy require that the carriers should be obliged to tell them what they should do.

Although a carrier may prove that the owner of goods knew that the carrier had limited his responsibility by a sufficient notice, yet [illegible] occasioned by gross negligence, the notice will not pro- [illegible] Every man [illegible] undertakes for reward to do any service obliges himself to use due diligence in the performance of that [illegible] responsibility as an insurer, a carrier [illegible] gross negligence. This point is settled by Sleat *v.* [illegible] B. & A. 342; Wright *v.* Snell, 5 B. & Ald. 350; Birkett *v.* Willan, [illegible] Evans, 16 Law. 244; and Boldenham *v.* [illegible] 1 Ohio, 31

The jury are to decide what is gross negligence. We may, however, observe that the most anxiously-attentive person may slip into inadvertence or want of caution. Such a slip would be negligence, but not such a degree of negligence as would deprive a carrier of the protection of his notice. The notice will protect him, unless the jury think that no prudent person, having the care of an important concern of his own, would have conducted himself with so much inattention or want of prudence as the carrier has been guilty of.

If a notice touching the responsibility of the carrier be given, it matters not by whom it is given, or in what form, if it tells the owner of the goods that the carrier by whom he proposes to send them will not undertake for their safe conveyance, unless paid a premium proportioned to their value.

We have established these points, — that a carrier is an insurer of the goods which he carries; that he is obliged, for a reasonable reward, to carry any goods to the place to which he professes to carry goods that are offered him, if his carriage will hold them, and he is informed of their quality and value; that he is not obliged to take a package, the owner of which will not inform him what are its contents, and of what value they are; and if he does not ask this information, or if, when he asks, and is not answered, he takes the goods, he is answerable for their amount, whatever that may be; that he may limit his responsibility, as an insurer, by notice; but that a notice will not protect him against the consequences of a loss by gross negligence.[1] . . .

HOLLISTER *v.* NOWLEN.

19 Wend. (N. Y. Sup. Ct.) 234. 1838.

This was an action against the defendant as a common carrier for the loss of the plaintiff's trunk and contents. A case was agreed on between the parties stating the following facts: the defendant was a member of a company, the proprietors of the three daily lines of stagecoaches running between Canandaigua and Buffalo, one of which was called the Telegraph line. The defendant resided at Avon, and with his teams and coaches ran that part of the route lying between Avon and Le Roy. East of Canandaigua the line was owned by other proprietors. The plaintiff resided at Utica, and at that place entered as a passenger in the Telegraph line for Buffalo. His baggage consisted of a trunk, containing clothing to

[1] The judge discusses the sufficiency of certain notices, but that portion of the opinion is not deemed important, and is omitted. — [Ed.]

the value of $116.75. The fare was duly paid. On the 20th July, 1833, before daylight in the morning, the plaintiff left Avon in the defendant's coach on his way to Buffalo. The trunk was placed in the boot behind the coach, which was carefully secured by strong leather covering, fastened with strong leather straps, and buckles, and was made secure against any loss except by violence. After proceeding about three miles it was discovered that the straps confining the cover of the boot had been cut, and the plaintiff's trunk with its contents had been feloniously stolen and carried off. There was no negligence on the part of the defendant or his servants in relation to the trunk, further than may be implied from the facts above stated. The plaintiff left the stage, went back to Avon, and reported his loss; and the defendant offered a reward, and made all proper efforts for the recovery of the property, but without success.

The Telegraph line was established in 1828. A public notice *that baggage sent or carried in the Telegraph line would be at the risk of the owner thereof*, printed on a large sheet, had been uniformly kept placarded in most of the stage offices and public houses from Albany to Buffalo; and particularly such notice had been continually affixed up in the stage office and principal public houses at Utica, where the plaintiff had resided for the last three years before the trunk was lost. It was stipulated that should the court be of opinion that the plaintiff was entitled to recover, judgment should be entered in his favor for $116.75, and interest from July 20, 1833, besides costs.

Bronson, J. Stagecoach proprietors, and other carriers by land and water, incur a very different responsibility in relation to the passenger and his baggage. For an injury to the passenger they are answerable only where there has been a want of proper care, diligence, or skill; but in relation to baggage they are regarded as insurers, and must answer for any loss not occasioned by inevitable accident or public enemies. As the point, though made, was not discussed by the defendant's counsel, I shall content myself with referring to a few cases to prove that they are liable as common carriers, for the loss or injury of the property of the passenger. Orange Co. Bank *v.* Brown, 9 Wendell, 85 [**34**]; Camden Company *v.* Burke, 13 id. 611; Brooke *v.* Pickwick, 4 Bing. 218; 4 Esp. R. 177; 2 Kent, 601. The fact that the owner is present, or sends his servant to look after the property, does not alter the case. Robinson *v.* Dunmore, 2 Bos. &. Pull. 418. Chambre, J., said: "It has been determined, that if a man travel in a stagecoach and take his portmanteau with him, though he has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost." The liability of a carrier is like that of an innkeeper; and it was said in Cayle's case, 8 Co. 63, that "it is no excuse for the innkeeper to say that he delivered the guest the key of the chamber in which he lodged, and that he left

the door open; but he ought to keep the goods and chattels of his guest there in safety." When there is no fraud, the fact that the owner accompanies the property cannot affect the principle on which the carrier is charged in case of loss.

The principal question in the cause arises out of the notice given by the coach proprietors, *that baggage carried by the Telegraph line would be at the risk of the owner;* and the first inquiry is, whether there was sufficient evidence to charge the plaintiff with a knowledge of the notice. If we are to follow the current of modern English decisions on this subject, it cannot be denied that there was evidence to be left to a jury, and upon which they might find that the plaintiff had seen the notice. But I think the carrier, if he can by any means restrict his liability, can only do so by proving *actual notice* to the owner of the property. I agree to the rule laid down by Best, C. J., in Brooke *v.* Pickwick, 4 Bing. 218, decided in 1827, when the courts of Westminster Hall had commenced retracing their steps in relation to the liability of carriers, and were endeavoring to get back on to the firm foundation of the common law. He said: "If coach proprietors wish honestly to limit their responsibility, they ought to announce their terms to every individual who applies at their office, and at the same time to place in his hands a printed paper, specifying the precise extent of their engagement. If they omit to do this, they attract customers under the confidence inspired by the extensive liability which the common law imposes upon carriers, and then endeavor to elude that liability by some limitation which they have not been at the pains to make known to the individual who has trusted them."

I should be content to place my opinion upon the single ground that if a notice can be of any avail, it must be directly brought home to the owner of the property; and that there was no evidence in this case which could properly be submitted to a jury to draw the inference that the plaintiff knew on what terms the coach proprietor intended to transact his business. But other questions have been discussed; and there is another case before the court where the judge at the circuit thought the evidence sufficient to charge the plaintiff with notice. It will therefore be proper to consider the other questions which have been made by the counsel.

Can a common carrier restrict his liability by a general notice, in any form, brought home to the opposite party? Without intending to go much at large into this vexed question, it will be necessary to state some leading principles relating to the duties and liabilities of the carrier, and the ground upon which his responsibility rests.

The rules of the common law in relation to common carriers are simple, well defined, and, what is no less important, well understood. The carrier is liable for all losses except those occasioned by the act of God or the public enemies. He is regarded as an insurer of the property committed to his charge, and neither destruc-

tion by fire, nor robbery by armed men, will discharge him from liability. Holt, C. J., in pronouncing his celebrated judgment in the case of Coggs *v.* Barnard, 2 Ld. Raym. 918, said: "This is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing." In Forward *v.* Pittard, 1 T. R. 27 [**97**], where the carrier was held liable for a loss by fire, Lord Mansfield said, that "to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightnings, and tempests." And in relation to a loss by robbery he said, "The true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil." The rule has been fully recognized in this State. Colt *v.* McMechen, 6 Johns. R. 160 [**104**]; Elliot *v.* Rossell, 10 Johns. R. 1; Kemp *v.* Coughtry, 11 Johns. R. 107. In Roberts *v.* Turner, 12 Johns. R. 232 [**32**], Spencer, J., said, the carrier "is held responsible as an insurer of the goods, to prevent combinations, chicanery, and fraud."

A common carrier exercises a public employment, and consequently has public duties to perform. He cannot, like the tradesman or mechanic, receive or reject a customer at pleasure, or charge any price that he chooses to demand. If he refuse to receive a passenger or carry goods according to the course of his particular employment, without a sufficient excuse, he will be liable to an action; and he can only demand a reasonable compensation for his services and the hazard which he incurs. 2 Ld. Ray. 917; Bac. Ab., Carriers (B.) Skin. 279; 1 Salk. 249, 50; 5 Bing. 217; 3 Taunt. 272, per Lawrence, J.; 2 Kent, 599; Story on Bailments, 328; Jeremy on Carriers, 59.

It has been said that the carrier is liable in respect of his reward. Lane *v.* Cotton, 1 Salk. 143. Lord Coke says, "He hath his hire, and thereby implicitly undertaketh the safe delivery of the goods delivered to him." Co. Litt. 89 [a.]. The carrier may no doubt demand a reward proportioned to the services he renders and the risk he incurs; and, having taken it, he is treated as an insurer, and bound to the safe delivery of the property. But the extent of his liability does not depend on the terms of his contract; it is declared by law. His undertaking, when reduced to form, does not differ from that of any other person who may agree to carry goods from one place to another, and yet one who does not usually exercise this public employment will incur no responsibility beyond that of an ordinary bailee for hire; he is not answerable for a loss by any means against which he could not have guarded by ordinary diligence. It is not the form of the contract, but the policy of the law,

which determines the extent of the carrier's liability. In Ansell *v.* Waterhouse, 2 Chit. R. 1, which was an action on the case against the proprietor of a stagecoach for an injury to the plaintiff's wife, Holroyd, J., said: "This action is founded on what is quite *collateral to the contract*, if any; and the *terms* of the contract, unless changing the duty of a common carrier, are in this case quite *immaterial*. The declaration states an obligation *imposed upon him by the law*. This is an action against a person, who, by an ancient law, held as it were a *public office*, and was bound to the public. This action is founded on the general obligation of the law." In Forward *v.* Pittard, 1 T. R. 27 [**97**], Lord Mansfield said: "It appears from all the cases for 100 years back that there are events for which the carrier is liable *independent of his contract*. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a *further* degree of responsibility by the custom of the realm, that is, *by the common law;* a carrier is in the nature of an *insurer*." See also Hide *v.* Proprietors, etc., 1 Esp. R. 36.

The law in relation to carriers has in some instances operated with severity, and they have been charged with losses against which no degree of diligence could guard. But cases of this description are comparatively of rare occurrence; and the reason why they are included in the rule of the common law is not because it is fit in itself that any man should answer without a fault, but because there are no means of effectually guarding the public against imposition and fraud, without making the rule so broad that it will sometimes operate harshly. It was well remarked by Best, C. J., in Riley *v.* Horne, 5 Bing. 217 [**169**], that "when goods are delivered to the carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to their place of destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves." These remarks lose little of their force when applied to the case of passengers in stages, steamboats, and railroad cars. For although they are in the neighborhood of their property, it is neither under their eye, nor have they any efficient means of protecting it against the consequences of negligence and fraud. The traveller is usually among strangers; his property is in the hands of men who are sometimes selected with little regard to their diligence and fidelity; and if the remedy of the owner in the case of loss depend on the question of actual negligence or fraud, he must make out his right to recover by calling the very men whose recklessness or frailty has occasioned the injury. It was remarked by Best, C. J., in Brooke *v.* Pickwick, 4 Bing. 218, that,

though coach proprietors of the present day are a respectable and opulent class, many of the persons employed by them resemble those whom the common law meant to guard against."

There is less of hardship in the case of the carrier than has sometimes been supposed; for while the law holds him to an extraordinary degree of diligence, and treats him as an insurer of the property, it allows him, like other insurers, to demand a premium proportioned to the hazards of his employment. The rule is founded upon a great principle of public policy; it has been approved by many generations of wise men; and if the courts were now at liberty to make instead of declaring the law, it may well be questioned whether they could devise a system which, on the whole, would operate more beneficially. I feel the more confident in this remark from the fact that in Great Britain, after the courts had been perplexed for thirty years with various modifications of the law in relation to carriers, and when they had wandered too far to retrace their steps, the legislature finally interfered, and in all its most important features restored the salutary rule of the common law.

The doctrine that a carrier might limit his responsibility by a general notice brought home to the employer, prevailed in England for only a short period. In Smith *v.* Horne, 8 Taunt. 144, Burrough, J., said: "The doctrine of notice was never known until the case of Forward *v.* Pittard, 1 T. R. 27 [**97**], which I argued many years ago." That case was decided in 1785, and it is remarkable that it does not contain one word on the subject of notice. If that question was in any form before the court, it is not mentioned by the reporter; and the decision was against the carrier, although the loss was occasioned by fire, without his default. The doctrine was first recognized in Westminster Hall in 1804, when the case of Nicholson *v.* Willan, 5 East, 507, was decided. Lord Ellenborough said, the practice of making a "special acceptance" had prevailed for a long time, and that there was "no case to be met with in the books in which the right of a carrier thus to limit by *special contract* his own responsibility has ever been by express decision denied." Whatever may be the rule where there is *in fact* a special contract, the learned judge could not have intended to say, that a carrier had for a long time been allowed to limit his liability by a general notice, or that a special contract had been implied from such a notice; for he refers to no case in support of the position, and would have searched to vain to find one. Only eleven years before (in 1793), Lord Kenyon had expressly laid down a different rule in Hide *v.* Pigott, &c., 1 Esp. R. 35. He said, "There is a difference where a man is chargeable *by law* generally, and where on his *contract*. Where one is bound to any duty and chargeable to a certain extent in the execution of [it], in such case, he cannot *by any act of his own* discharge himself." And he put the case of common carriers, and said, that cannot discharge themselves "by any act of

their own, *as by giving notice*, for example, to that effect." This case was afterwards before the K. B., but on another point (1 T. R. 389).

The doctrine in question was not received in Westminster Hall without much doubt; and although it ultimately obtained something like a firm footing, many of the English judges have expressed their regret that it was ever sanctioned by the courts. Departing as it did from the simplicity and certainty of the common-law rule, it proved one of the most fruitful sources of legal controversy which has existed in modern times. When it was once settled that a carrier might restrict his liability by a notice brought home to his employer, a multitude of questions sprung up in the courts which no human foresight could have anticipated. Each carrier adopted such a form of notice as he thought best calculated to shield himself from responsibility without the loss of employment; and the legal effect of each particular form of notice could only be settled by judicial decision. Whether one who had given notice that he would not be answerable for goods beyond a certain value unless specially entered and paid for, was liable in case of loss to the extent of the value mentioned in the notice, or was discharged altogether; whether, notwithstanding the notice, he was liable for a loss by negligence, and if so, what degree of negligence would charge him; what should be sufficient evidence that the notice came to the knowledge of the employer, whether it should be left to the jury to presume that he saw it in a newspaper which he was accustomed to read, or observed it posted up in the office where the carrier transacted his business; and then whether it was painted in large or small letters, and whether the owner went himself or sent his servant with the goods, and whether the servant could read, — these and many other questions were debated in the courts, while the public suffered an almost incalculable injury in consequence of the doubt and uncertainty which hung over this important branch of the law. See 1 Bell's Com. 474. After years of litigation, parliament interfered in 1830 and relieved both the courts and the public, by substantially re-asserting the rule of the common law. Stat. 1 Wm. 4, c. 68.

Without going into a particular examination of the English cases, it is sufficient to say that the question has generally been presented, on a notice by the carrier that he would not be responsible for any loss beyond a certain sum, unless the goods were specially entered and paid for; and the decisions have for the most part only gone far enough to say that if the owner do not comply with the notice by stating the true value of the goods and having them properly entered, the carrier will be discharged. In these cases, the carrier had not attempted to exclude all responsibility. But there are two *nisi prius* decisions which allow the carrier to cast off all liability whatever. In Maving *v.* Todd, 1 Stark. R. 72, the defendant had given notice that he would not answer for a loss by fire, and such a

loss having occurred, Lord Ellenborough thought that carriers might exclude their liability altogether, and nonsuited the plaintiff. In Leeson *v.* Holt, 1 Stark. R. 186, tried in 1816, he made a like decision; though he very justly remarked, that "if this action had been brought twenty years ago, the defendant would have been liable; *since by the common law* a carrier is liable in all cases except two." We have here, what will be found in many of the cases, a very distinct admission that the courts had departed from the law of the land, and allowed what Jeremy's Treatise on Carriers, 35, 6, very properly terms "recent innovations."

Some of the cases which have arisen under a general notice have proceeded on the ground of fraud (Batson *v.* Donovan, 4 B. & Ald. 21); others on the notion of a special acceptance or special contract (Nicholson *v.* Willan, 5 East, 507; Harris *v.* Packwood, 3 Taunt. 271 [**164**]); while in some instances it is difficult to say what general principle the court intended to establish.

So far as the cases have proceeded on the ground of fraud, and can properly be referred to that head, they rest on a solid foundation; for the common law abhors fraud, and will not fail to overthrow it in all the forms, whether new or old, in which it may be manifested. As the carrier incurs a heavy responsibility, he has a right to demand from the employer such information as will enable him to decide on the proper amount of compensation for his services and risk, and the degree of care which he ought to bestow in discharging his trust; and if the owner give an answer which is false in a material point, the carrier will be absolved from the consequences of any loss not occasioned by negligence or misconduct. The case of Kenrig *v.* Eggleston, Aleyn, 93, was decided in 1649. The plaintiff delivered a box to the porter of the carrier, saying, "there was a book and tobacco in the box," when in truth it contained £100 in money, besides. Roll. J., thought the carrier was nevertheless liable for a loss by robbery; "but in respect of the intended *cheat* to the carrier, he told the jury they might consider him in damages." The jury, however, found the whole sum (abating the carriage) for the plaintiff, *quod durum videbatur circumstantibus*. In Gibbon *v.* Payuton, 4 Burr. 2298 [**160**], Lord Mansfield said, this was a case of *fraud*, and he "should have agreed in opinion with the *circumstantibus*." In Tyly *v.* Morrice, Carth. 485, two bags of money sealed up were delivered to the carrier, saying they contained £200, and he gave a receipt for the money. In truth the bags contained £450, and the carrier, having been robbed, paid the £200; and in this action brought to recover the balance, the Chief Justice told the jury that "since the plaintiffs had taken this course to defraud the carrier of his reward, they should find for the defendant." And the same point was decided in another action against the same carrier. In Gibbon *v.* Payuton, 4 Burr. 2298 [**160**], £100 in money was hid in hay in an old mail-bag, which lost the plaintiff

concealed from the carrier; and the money having been stolen, the court held that this fraud would discharge the defendant. In the case of the Orange Co. Bank *v.* Brown, 9 Wendell, 85 [**34**], the agent of the plaintiffs put $11,000 in bank bills in his trunk, and delivered it to the captain of the steamboat as his *baggage*. The court held that the term baggage would only include money for the expenses of travelling, and not a large sum, as in this case, taken for the mere purpose of transportation; and it was said that the conduct of the plaintiff's agent was a virtual concealment as to the money, that "his representation of his trunk and the contents as baggage was not a fair one, and was calculated to deceive the captain." The owner is not bound to disclose the nature or value of the goods; but if he is inquired of by the carrier, he must answer truly. Phillips *v.* Earle, 8 Pick. 182.

Fraud cannot, I think, be imputed to the owner, from the mere fact that he delivers goods after having seen a general notice published by the carrier, whatever may be its purport. If the carrier wishes to ascertain the extent of his risk, he should inquire at the time the goods are delivered; and then if he is not answered truly, he will have a defence. See 4 Bing. 218. A different rule practically changes the burden of proof. At the common law it is enough that the owner prove the undertaking of the carrier, and that the goods did not reach their destination. But this doctrine of implying fraud from a notice requires him to go further, and show that he complied with the terms of the advertisement. He may have informed the carrier truly of the value of the goods: there may be no fraud, but still he is required to prove himself innocent before he can recover. Independent of a notice, the onus would rest where, upon general principles, it ought to rest, on him who imputes fraud; and the carrier could not discharge himself without showing some actual misrepresentation or fraudulent concealment. It does not lie on the employer to show how the loss was occasioned, or that he has acted properly; but the law presumes against the carrier, until he proves that the loss happened by means or under circumstances for which he is not answerable. 1 T. R. 33; Murphy *v.* Staton, 3 Munf. (Va.) 239; Story on Bail. 338.

But it is enough for this case, that the question of fraud can never arise under such notice as was given by the defendant. He did not say to the public that he would not be answerable for baggage beyond a certain sum, unless the owner disclosed the value; he said he would not be answerable in any event. It was, in effect, a notice that he would not abide the liabilities which the law, upon principles of public policy, had attached to his employment. If the notice can aid the defendant in any form, it certainly does not go to the question of fraud.

The only remaining ground of argument in favor of the carrier is, that a special contract may be inferred from the notice. Inde-

pendent of the modern English cases, it seems never to have been directly adjudged that the liability of the carrier can be restricted by a special contract. Noy (Maxims), 92, after speaking of a loss by negligence, says: "If a carrier would refuse to carry, unless a promise were made to him that he should not be charged with any such miscarriage, that promise were void." If he cannot stipulate for a partial, it is difficult to see how he can for a total, exemption from liability. In Nicholson *v.* Willan, 5 East, 513, Lord Ellenborough found no direct adjudication in favor of the position that a carrier may limit his responsibility by a special contract; but he relied on the fact that such an exemption had never been "by express decision denied." Although this mode of reasoning is not the most conclusive, I shall not deny that the carrier may, by express contract, restrict his liability; for, though the point has never been expressly adjudged, it has often been assumed as good law. Aleyn, 93; 4 Co. 84, note to Southcote's case; 4 Burr. 2301, per Yates, J., 1 Vent. 190, 238; Peake, N. P. Cas. 150; 2 Taunt. 271; 1 Stark. R. 186. If the doctrine be well founded, it must, I think, proceed on the ground that the person intrusted with the goods, although he usually exercises that employment, does not in the particular case act as a common carrier. The parties agree that in relation to that transaction he shall throw off his public character, and, like other bailees for hire, only be answerable for negligence or misconduct. If he act as a carrier, it is difficult to understand how he can make a valid contract to be discharged from a duty or liability imposed upon him by law.

But, conceding that there may be a special contract for restricted liability, such a contract cannot, I think, be inferred from a general notice brought home to the employer. The argument is, that where a party delivers goods to be carried after seeing a notice that the carrier intends to limit his responsibility, his assent to the terms of the notice may be implied. But this argument entirely overlooks a very important consideration. Notwithstanding the notice, the owner has a right to insist that the carrier shall receive the goods subject to all the responsibilities incident to his employment. If the delivery of goods under such circumstances authorizes an implication of any kind, the presumption is as strong, to say the least, that the owner intended to insist on his legal rights, as it is that he was willing to yield to the wishes of the carrier. If a coat be ordered from a mechanic after he has given the customer notice that he will not furnish the article at a less price than one hundred dollars, the assent of the customer to pay that sum, though it be double the value, may perhaps be implied; but if the mechanic had been under a legal obligation not only to furnish the coat, but to do so at a reasonable price, no such implication could arise. Now the carrier is under a legal obligation to receive and convey the goods safely, or answer for the loss. He has no right to prescribe any

other terms; and a notice can at the most only amount to a proposal for a special contract, which requires the assent of the other party. Putting the matter in the most favorable light for the carrier, the mere delivery of goods after seeing a notice cannot warrant a stronger presumption that the owner intended to assent to a restricted liability on the part of the carrier, than it does that he intended to insist on the liabilities imposed by law; and a special contract cannot be implied where there is such an equipoise of probabilities.

Making a notice the foundation for presuming a special contract, is subject to a further objection. It changes the burden of proof. Independent of the notice, it would be sufficient for the owner to prove the delivery and loss of the goods; and it would then lie on the carrier to discharge himself by showing a special contract for a restricted liability. But giving effect to the notice makes it necessary for the owner to go beyond the delivery and loss of the goods, and prove that he did not assent to the proposal for a limited responsibility. Instead of leaving the *onus* of showing assent on him who sets up that affirmative fact, it is thrown upon the other party, and he is required to prove a negative, that he did not assent.

After all that has been or can be said in defence of these notices, whether regarded either as a ground for presuming fraud or implying a special agreement, it is impossible to disguise the fact that they are a mere contrivance to avoid the liability which the law has attached to the employment of the carrier. If the law is too rigid, it should be modified by the legislature, and not by the courts. It has been admitted over and over again by the most eminent English judges, that the effect given to these notices was a departure from the common law; and they have often regretted their inability to get back again to that firm foundation. The doctrine that a carrier may limit his responsibility by a notice was wholly unknown to the common law at the time of our revolution. It has never been received in this, nor, so far as I have observed, in any of the other States. The point has been raised, but not directly decided. Barney *v.* Prentiss, 4 Har. & Johns. R. 317; Dwight *v.* Brewster, 1 Pick. 50 [**16**]. Should it now be received among us, it will be after it has been tried, condemned, and abandoned in that country to which we have been accustomed to look for light on questions of jurisprudence.

The Act of Parliament already mentioned enumerates various articles of great value in proportion to the bulk, and others which are peculiarly exposed to damage in transportation, and declares that the carrier shall not be liable for the loss or injury of those articles when the value exceeds £10, unless at the time of delivery the owner shall declare the nature and value of the property, and pay the increased charge which the carrier is allowed to make for his risk and care. If the owner complies with this requirement,

the carrier must give him a receipt for the goods, "acknowledging the same to have been *insured*," and if he refuse to give the receipt, he remains "liable and responsible *as at the common law*." The provision extends to the proprietors of stagecoaches as well as all other carriers, and to property which may "accompany the person of any passenger," as well as other goods; and the statute declares that after the first day of September, 1830, "*no public notice* or declaration heretofore made, or hereafter to be made, *shall be deemed or construed to limit, or in any wise affect the liability at common law*" of any carriers; but that all and every such carrier shall be "liable *as at the common law* to answer" for the loss or injury of the property, "*any public notice* or declaration by them made and given contrary thereto, or in any wise limiting such liability, notwithstanding." The only modification of the common-law rule in relation to carriers made by this statute, is that which requires the owner, without a special request, to disclose the nature and value of the package, when it contains articles of a particular description. The premium for care and risk, the carrier might have required before. In relation to all articles not enumerated, and in relation to those also, if the owner comply with the requirements of the act, the carrier is declared liable as an insurer, and must answer "*as at the common law*." The whole doctrine which had sprung up under notices is cut up by the roots, and in such language as renders it apparent that the legislature deemed it an innovation on the law of the land.

If after a trial of thirty years the people of Great Britain, whose interests and pursuits are not very dissimilar to our own, have condemned the whole doctrine of limiting the carrier's liability by a notice; if after a long course of legal controversy they have retraced their steps, and returned to the simplicity and certainty of the common-law rule, — we surely ought to profit by their experience, and should hesitate long before we sanction a practice which not only leads to doubt and uncertainty concerning the rights and duties of the parties, but which encourages negligence, and opens a wide door to fraud.

If the policy of the law in relation to carriers were more questionable than I think it is, it would be the business of the legislature, and not of the courts, to apply the proper remedy. The plaintiff is entitled to judgment in pursuance of the stipulation contained in the case.[1]

[1] A brief opinion by Cowen, J., on the same question was rendered at the same term in Cole v. Goodwin, 19 Wend. 251.

JUDSON *v.* WESTERN R. CO.

6 Allen (Mass.), 486. 1863.

Contract in which the plaintiff seeks to charge the defendants as common carriers, for the loss of a quantity of dressed deer-skins, which were in the defendants' freight depot at East Albany on the evening of the 5th of July, 1861, when it with all its contents was destroyed by an accidental fire.

At the second trial in the Superior Court, before Putnam, J., after the decision reported in 4 Allen, 520, there was evidence tending to show, and it was found by the jury, that on the afternoon of the 5th of July, 1861, two boxes, marked "G. C. Judson, Springfield, Mass., by railroad," were delivered by the New York Central Railroad Company to the defendants at East Albany, for immediate transportation, with the necessary vouchers and expense bills; and it further appeared that the defendants have for the past ten years issued freight tariffs, which were in force in July, 1861, containing among other provisions the following: "No risk assumed beyond $200 on any one package except by special agreement. All goods and merchandise will be at the risk of the owners while in the corporation's storehouses, and no responsibility will be admitted for any loss or injury except such as may arise by fire from the locomotive engines, or by negligence of the agents of the corporation; nor for a greater amount than $200 on any one package, except by special agreement." These tariffs were posted in all the freight-houses of the corporation, and liberally distributed to the public, and, before the 5th of July, 1861, a large number of these freight tariffs were delivered by the defendants to the freight agents of the New York Central Railroad Company at Albany. A notice similar to that contained in the freight tariffs was, and for many years had been, inserted in the printed receipts given for goods delivered at the several stations of the defendants for transportation, but the defendants did not propose to bring these notices home to the plaintiff in any other way than as above stated; and the plaintiff himself testified that he had never seen them, and was ignorant of their existence.

The New York Central Railroad Company received the boxes from the plaintiff's agent, at Fonda, in the State of New York, and gave for them a shipping receipt which contained the following stipulation, amongst others: "Goods or property consigned to any place off the company's line of road, or to any point or place beyond its termini, will be sent forward with as reasonable despatch as the general business of the corporation at its warehouse within mentioned will admit, by a carrier or freight man, when there are such

known to the station agent at said warehouse willing to receive the same, unconditionally, for transportation, the company acting, for the purpose of delivery to such carrier or freight man, as the agents of the consignor or consignee, and not as carriers."

The defendants requested the court to instruct the jury that the limitations and conditions contained in their tariff and freight receipts, brought home to the knowledge of the agents of the New York Central Railroad Company as above stated, would exempt them from all liability for the loss of the goods, or in any event would exempt them from liability beyond $200 on each parcel. The judge declined so to rule.

The jury returned a verdict for the plaintiff, with $1020.93 damages, and the case was reported for the consideration of this court.

Bigelow, C. J. It would not be profitable to enter upon a citation and discussion of the numerous and conflicting cases bearing on the question of the rights of a common carrier, by a general notice, to absolve himself entirely from his common-law liability for property intrusted to his care, or to modify and limit his responsibility by a mere constructive notice to those who may have occasion to place goods, wares, and merchandise in his keeping for the purpose of transportation. A careful examination of the authorities would not lead to any very satisfactory result, or throw much light on the real principles on which the respective rights and duties of carriers and the public mainly depend. A very full and clear statement of the results arrived at in the leading cases on the subject can be found in the elementary writers, especially in Redfield on Railways, 264; Angell on Carriers, §§ 232–245; 1 Parsons on Con. 707.

There is, however, one conclusion which is fully supported by the weight of authority in the American courts, concerning which no serious doubt can be entertained; that is, that a public carrier may enter into a special contract with his employer by which he may stipulate for a partial or entire exoneration from his liability at common law as an insurer of property committed to his custody, and that such contract is not contrary to public policy, or invalid as transcending the just limits of the right of parties to regulate their dealings by special stipulations. As a necessary corollary of this conclusion, it is also held in the best-considered cases and by the most approved text-writers, that a notice by a carrier that he will not assume the ordinary responsibilities imposed on him by law, if brought home to the owner of goods delivered for transportation, and assented to clearly and unequivocally by him, will be binding and obligatory upon him, because it is tantamount to an express contract that the goods shall be carried on the terms specified in such notice. To this extent, the doctrine that a carrier may limit or modify his liability seems to be most just and reasonable. Inasmuch as the rule of law which holds a carrier to the responsibility

of an insurer, except in certain special cases, is founded in a policy which is designed solely for the security and benefit of the owner of goods, there can be no sufficient reason for regarding the rule as absolutely inflexible or irrepealable, when the party, in whose favor it will operate, directly or by necessary implication consents to waive it, or agrees to an essential modification of his own rights under it.

But it is a very different proposition to assert that a common carrier may escape his legal liability or materially change it by a general notice to all persons that he will not be responsible for the loss or injury of property intrusted to his custody, or only liable therefor under such conditions and limitations as he may think proper to impose. A common carrier is in a certain sense a public servant, exercising an employment not merely for his own emolument and advantage, but for the convenience and accommodation of the community in which he pursues his calling. The law imposes on him certain duties and responsibilities different from and greater than those which attach to an occupation of a purely private nature, in regard to the conduct of which the public have no interest, and which can be carried on at the option or according to the pleasure of the person who is engaged in it. A common carrier cannot legally refuse to transport property of a kind which comes within the class which he usually carries in the course of his employment, if it is tendered to him at a suitable time and place, with an offer of a reasonable compensation. Like an innkeeper, he is obliged to exercise his calling upon due request under proper circumstances, and is liable to an action for damages if he wrongfully refuses to do so. A legal obligation rests upon him to assume the duty which he holds himself out as ready to perform, and a correlative right belongs to the owner of goods to ask for and require their reception and transportation upon the terms of liability fixed and defined by the established rules of law. The carrier has not the option to accept or refuse the carriage of the goods at his pleasure; but the person seeking to have them transported can choose whether they shall be carried without any restriction of the carrier's duty as prescribed by law, or whether he will waive a portion of his rights, and consent to a modification of the legal liability which attaches to the carrier. Such being the legal relation which subsists between a common carrier and his employer, it certainly would be inconsistent with it to hold that a carrier, by a mere notice brought home to the owner of goods intrusted to his care that he did not intend to assume all the liabilities of his calling, could escape or materially change the responsibility which the law annexes to the contract of the parties. It would in effect put it in the power of the carrier to abrogate the rules of law by which the exercise of his employment is regulated and governed. Certainly such a notice, even if shown to have been within the knowledge of the owner of goods, would, in

the absence of evidence of his direct assent to its terms, afford no sufficient ground for the inference that he had voluntarily agreed without any consideration to relinquish and give up the valuable right of having his goods carried at the risk of the carrier. On the contrary, it would be quite as reasonable to infer under such circumstances that the carrier did not intend to rely upon a notice upon which he could not legally insist, as that the owner of goods meant to surrender a right to which he was entitled by law. In such case, mere silence cannot be said to amount to acquiescence. The leading cases in the American courts in which these doctrines have been recognized and established are New Jersey Steam Navigation Co. *v.* Merchants' Bank, 6 How. (U. S.) 344; Farmers' & Mechanics' Bank *v.* Champlain Transportation Co., 23 Verm. 186, 205; Kimball *v.* Rutland & Burlington Railroad, 26 Verm. 247; Moses *v.* Boston & Maine Railroad, 4 Fost. (N. H.) 71. See also the recent English case of Garton *v.* Bristol & Exeter Railway, 1 Best & Smith, 112, 161.

The application of these principles to the present case is decisive against the right of the defendants to insist on the instructions for which they asked at the trial. It is not contended that the plaintiff had any actual knowledge of the notice issued by the defendants, containing a limitation of their common-law liability as carriers. If he had any knowledge at all, it was at most only constructive, through the New York Central Railroad Company, who received the goods for transmission over their own road, to be delivered to the defendants to be forwarded over a portion of their route. There is no fact in the case from which any assent by the plaintiff to the terms of the notice can be inferred. One portion of the notice on which the defendants rely goes to the extent of repudiating all liability for the loss or injury of goods delivered to the defendants and in process of transportation, except such as might be caused by fire from the locomotive engines or by the negligence of the agents of the corporation. This certainly was not binding on the plaintiff. Equally invalid was that portion of the notice which announced that the defendants would not be liable for a greater amount than two hundred dollars on any one package, except by special agreement. This was equivalent to a notice that they would not be liable for a greater amount than two hundred dollars on a single package, unless they chose to assume a further liability. It was optional with them, under this notice, whether they would make any such agreement or not. If they refused or omitted to do so, the owner of goods had no power to compel them to enter into any agreement. Nor, if the notice of itself is binding on him, had he any means of obtaining the safe transportation of his goods by the defendants above the value of two hundred dollars, under the liabilities imposed by law upon common carriers.

We do not mean to say that a general notice brought home to an

owner of goods may not be available to qualify and limit the responsibility of common carriers to a certain extent and within certain limits. Doubtless they may by such a notice require that information shall be given to them of the nature and value of the property which they are required to carry, in order that they may exercise a needful degree of care in its transportation, and may ascertain and demand a reasonable sum for its carriage. So they may give notice that property above a certain amount in value will not be transported for ordinary rates of freight, but that the price for its carriage will be regulated by the nature of the articles and the aggregate value of each package. In like manner they may by a general notice protect themselves against liability for loss or injury of merchandise, unless it is properly packed or arranged for transportation, so that it may with reasonable diligence and care be safely and securely carried. These and other similar notices would be reasonable and perfectly consistent with the nature of the employment of a common carrier, and the rules of law by which it is regulated, and they would be valid and binding on all to whom they were brought home, without any express assent. All that we mean to decide is, that a common carrier cannot by a general notice exonerate himself entirely from his legal liability, nor limit it absolutely to a certain amount beyond which he will not be held responsible in case of injury or loss. This was the legal effect of the notice on which the defendants rely in the present case, as is admitted by their counsel, who puts his defence to this action on the ground that they are not liable at all, or only for the sum of two hundred dollars on each package. Such a notice, being invalid, was not binding on the plaintiff, and he is therefore entitled to

Judgment on the verdict.

BOON *v.* STEAMBOAT BELFAST.

40 Ala. 184. 1866.

Appellants filed a libel in admiralty against the steamboat "Belfast" to recover the value of some cotton which they shipped on this boat at Columbus to be transported to Mobile, and which was never delivered. The owners of the boat intervened, and in their answer alleged that while the boat was proceeding down the river, it was forcibly boarded and seized by a body of armed men, and without any fault on the part of the officers and crew, and that the cotton was thereby lost. The remaining facts appear from the opinion.

Judge, J. The respondents, in their answer to the libel, made the following averment, in substance, as one of their grounds of defence: "That it is the universal practice and understanding amongst all persons navigating the waters of the Tombigbee River, and of all

persons shipping cotton to Mobile on said river, that where cotton is received on board of a steamboat to be transported to Mobile, if the boat is captured by armed men, and the cotton thereby lost to the owner or owners, without any fault or neglect of the officers or crew of the boat, neither the boat nor the owners of the boat are liable for said loss; that the said practice and understanding is general, and universally known to all persons navigating said river to Mobile; that is, that said custom is general, universal, and uniform, and known to all persons navigating said river, and all persons shipping cotton upon said river; that said custom existed at the time of the contract of shipment, and before that time, and was known to all persons who were engaged in shipping cotton on said river to Mobile, and to all persons navigating said river."

This allegation was excepted to by the libellants as setting up a custom in direct conflict with the law, and as being no bar to the libel. The court overruled the exception, and on the trial permitted parol evidence to be introduced by the respondents to sustain the allegation, against the objection of libellants.

The bill of lading was in the usual form. It acknowledged the receipt of a certain number of bales of cotton at Vienna, to be delivered at Mobile, "dangers of the river excepted." As to this cotton, the boat and its owner became answerable for accidents and thefts, and even for a loss by robbery. They became answerable for all losses which do not fall within the excepted cases of the act of God and public enemies. This, as Chancellor Kent remarks in his Commentaries, "has been the settled law of England for ages; and the rule is intended as a guard against fraud and collusion, and it is founded on the same broad principles of public policy and convenience which govern the case of innkeepers." 2 Kent's Com. 598.

"The only exception expressed in the contract in this case is 'dangers of the river.' The only exceptions implied by law are the act of God or of the public enemies." Cox, Brainard & Co. *v.* Peterson, 30 Ala. 608.

Whilst in all contracts, "as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages," and whilst "parol evidence of custom and usage is always admissible to enable us to arrive at the real meaning of the parties, who are naturally presumed to have contracted in conformity with the known and established usage," yet "it is not admitted to contradict, or substantially to vary, the legal import of a written agreement. The usage of no class of men can be sustained in opposition to the established principles of law." Addison on Contracts, 853; Price *v.* White, 9 Ala. 563; McClure & Co. *v.* Cox, Brainard & Co., 32 Id. 617.

The true and appropriate office of a usage or custom is correctly stated by Judge Story in the case of Schooner Reeside, 2 Sum. 567. In that case, it was attempted to vary the common bill of lading,

by which goods were to be delivered in good order and condition, "the danger of the seas only excepted," by establishing a custom that the owners of packet vessels between New York and Boston should be liable only for damages to goods occasioned by their own neglect. In delivering the opinion of the court, Judge Story said: "The true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions and acts of a doubtful or equivocal character. It may be also admitted to ascertain the true meaning of a particular word, or of particular words, in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and *a fortiori* not in order to contradict them. An express contract of the parties is always admissible to supersede or vary or control a custom or usage; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled or varied or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate written declarations of the parties." See also 2 Parsons on Contracts, note on page 59, and authorities there cited; Hone *v.* Mutual Safety Ins. Co., 1 Sand. 137.

"It may be difficult to draw the precise line of distinction between cases in which evidence of usage and custom ought to be admitted, and cases in which it ought not to be admitted." Upon this question, "much confusion and inaccuracy have crept into the adjudged cases, so that any attempt to reconcile them would necessarily prove abortive." McClure & Co. *v.* Cox, Brainard & Co., 32 Ala. 617; Barlow *v.* Lambert, 28 id. 704. But we think it clearly settled by the decided weight of authority that a general usage, the effect of which is to control rules of law, is inadmissible; and that the clear and explicit language of a contract cannot be enlarged or restricted by proof of a custom or usage.

The decisions of this court upon the question have generally been in accordance with this view. Andrews *v.* Roach and Caffey, 3 Ala. 590; Price *v.* White, 9 id. 563; West, Oliver & Co. *v.* Ball, 12 id. 340; Ivey *v.* Phifer, 13 id. 821; Petty *v.* Gayle, 25 id. 472; Barlow *v.* Lambert, 28 id. 704; Alabama and Tennessee Rivers R. R. Co. *v.* Kidd, 29 id. 221; Smith *v.* Mobile Nav. Ins. Co., 30 id. 167; Cox, Brainerd & Co. *v.* Peterson, 30 id. 608; McClure & Co. *v.* Cox, Brainard & Co., 32 id. 617; Jones *v.* Fort, 36 id. 422.

The decision in Steele *v.* McTyer's Adm'r, 31 Ala. 677, lays down a contrary principle; and so much of that decision as holds that parol evidence is admissible to show that by a custom existing on a particular river that common were not responsible for a loss caused by dangers of the river, although the bill of lading contained no such exception, being in opposition to the principle announced in this opinion on that question, is overruled.

In Sampson *v.* Gazzam, 6 Port. 123, it was held to be permissible for the owner of a steamboat, when sued for the loss of goods by fire, to show by parol that the exceptive words "dangers of the river," in a bill of lading, by custom and usage, includes dangers by fire. This decision has been so often recognized and followed by this court in cases involving the identical question that the principle established by it must now be regarded as the settled law of the State in its application only to cases of the particular class to which it specially relates; we are unwilling to extend its application beyond this limit. See Hibler *v.* McCartney, 31 Ala. 501.

The rule which makes the common carrier in the nature of an insurer, and answerable for every loss not attributable to the act of God or the public enemies, according to Lord Holt, "was a politic establishment, contrived by the policy of the law for the safety of all persons the necessity of whose affairs obliged them to trust those sorts of persons;" "it was introduced to prevent the necessity of going into circumstances impossible to be unravelled." "If it were not for such a rule, the common carrier might contrive by means not to be detected to be robbed of his goods in order to share the spoil." 2 Kent's Com. 603.

The same public policy which established this rule, and which has continued it in existence for ages, forbids its destruction at this day in any locality, by any pretended custom, especially when the business of common carriers has so much increased, and the necessity for the rule, instead of being diminished, is also increased. The custom, then, sought to be established in this case is contrary to law, in contravention of a sound public policy, and cannot receive our sanction.

It follows that the court below erred in overruling the designated exceptions to the answer of respondents, and in admitting parol evidence to establish the custom relied on; and its decree must be reversed and the cause remanded.

BLOSSOM *v.* DODD.

43 N. Y. 264. 1870.

APPEAL from an order of the General Term of the Supreme Court, in the second judicial district, setting aside a judgment entered upon the report of a referee and granting a new trial.

This action was brought to recover for baggage of the plaintiff lost by the defendant.

The defendant was the president of Dodd's Express, a joint stock company, doing business in the city of New York and its vicinity.

On the 17th of October, 1866, the plaintiff was a passenger on a train of cars, which was proceeding to New York on the New Jersey Central Railroad. When the train was nearly at the end of its route, and between the hours of ten and eleven o'clock in the evening, a messenger of Dodd's Express entered the car and inquired of him if he had any baggage to be delivered.

The plaintiff thereupon handed to the messenger two railroad baggage-checks, one of which was for a gun-case containing a gun, and the other was a valise containing wearing apparel and other articles. The messenger entered the numbers of the checks in pencil upon a card or receipt of which the following is a copy, omitting the advertisement in large type at the top of the paper.

RECEIVED OF M. .....

N. J. R. R. DEPOT, PIER 13 N. R., }
No. 944 BROADWAY, N. Y. }

DODD'S EXPRESS.

ARTICLES OR CHECKS NUMBERED AS BELOW.

FOR DODD'S EXPRESS.

☞ It is mutually agreed, and is part of the consideration of the contract, that DODD'S EXPRESS *shall not be liable* for merchandise or jewelry *contained in baggage*, nor for loss by fire, nor for an amount exceeding ONE HUNDRED DOLLARS upon any article unless specially agreed for in writing on the receipt *and the extra risk paid therefor*, nor for baggage to railroad, steamboat, or steamship lines after the same has been left at the usual place of delivery to such lines, and the owner hereby agrees that Dodd's Express *shall be liable only as above;* and it is further agreed that said express shall not be liable for loss or damage *unless the claim therefor* be made in writing at their principal office, with this receipt annexed, within thirty days thereafter.

☞ READ THIS RECEIPT. ☜

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At the time the cars were running rapidly, the lights were mostly out, and the car in which the plaintiff was, was nearly dark, but there was one light at the end.

This light was insufficient to enable the plaintiff to read the printed matter at the place where he sat, and he did not read it.

The said Dodd's Express received the valise and gun-case from the railroad company, and on the following day delivered the gun-case, but neglected to deliver the valise or any of its contents to the plaintiff. Evidence tending to show it was stolen, or fell from one of the plaintiff's wagons, was given.

The valise and its contents were worth about $260. The referee found that the valise was stolen from the defendant's wagon.

The answer put in issue the negligence and the value of the property lost, and set up a special contract restricting the liability of the defendant.

The case was tried before a referee, who found, as conclusions of law: —

1. The said baggage was received by the said Dodd's Express, to be transported to plaintiff's residence, under and subject to the conditions expressed in said receipt, and not otherwise.

2. That, by delivery to the plaintiff, and his acceptance of the said card or receipt, under the circumstances, he consented and agreed that said Dodd's Express should not be liable for the loss of the said valise to an amount exceeding one hundred dollars.

3. That the plaintiff is entitled to recover from defendant only the sum of one hundred dollars and interest from October 17, 1866.

To all of which conclusions of law the plaintiff excepted.

From the judgment entered upon this report, an appeal was taken to the General Term, where the judgment was set aside and a new trial ordered; and from such order an appeal was taken to this court.

CHURCH, Ch. J. The common-law liability of common carriers cannot be limited by a notice, even though such notice be brought to the knowledge of the persons whose property they carry. Dorr *v.* N. J. Steam Navigation Co., 1 Kern. 485. But such liabilities may be limited by express contract. Id.; Bissell *v.* N. Y. Central R. R. Co., 442; French *v.* Buffalo, N. Y. & Erie R. R. Co., 4 Keyes, 108.

The principal question in this case is, whether there was a contract made between the parties limiting the liability of the defendants to a loss of $100 for the valise and its contents, which the plaintiff intrusted to their care. A *fac-simile* of the card upon which the alleged contract was printed has been furnished in the papers. It does not appear, on examination, like a contract, and would not, from its general appearance, be taken for anything more than a token or check denoting the numbers of the checks received, to be used for identification upon the delivery of the baggage. The larger

portion of the printed matter is an advertisement, in large type. The alleged contract is printed in very small type, and is illegible in the night by the ordinary lights in a railroad car, and is not at all attractive, while other parts of the paper are quite so.

Considerable stress is laid upon the fact that the words, "Read this receipt," were printed on the card in legible type.

The receipt reads: "Received of M—— articles or checks numbered as below: 368—319." "For Dodd's Express." The blank is not filled, nor is the receipt signed by any one. The invitation is not to read the contract, but the receipt. In order to read it, the paper must be turned sideways; and no one, thus reading the receipt, would suspect that it had any connection with the alleged contract, which is printed in different and very small type across the bottom of the paper. It is no part of the receipt, is not connected with it, and is not referred to in any other part of the paper. The defendants are dealing with all classes of the community; and public policy, as well as established principles, demand that the utmost fairness should be observed.

This paper is subject to the criticism made by Lord Ellenborough, in Butler *v.* Heane, Camp. 415, in which he said, that "it called attention to everything that was attractive, and concealed what was calculated to repel customers;" and added: "If a common carrier is to be allowed to limit his liability, he must take care that any one who deals with him is fully informed of the limits to which he confines it." Nor did the nature of the business necessarily convey the idea of a contract to the traveller in such a manner as to raise the presumption that he knew it was a contract, expressive of the terms upon which the property was carried, or limiting the liability of the carrier. Baggage is usually identified by means of checks or tokens. And such a card does not necessarily import anything else. At all events, to have the effect claimed, the limitation should be as conspicuous and legible as other portions of the paper. In Brown *v.* E. R. R. Co., 11 Cush., 97, where the limitation was printed upon the back of a passenger ticket, the court say: "The party receiving it might well suppose that it was a mere check, signifying that the party had paid his passage to the place indicated on the ticket." In the cases of Prentice *v.* Decker, 49 Barb. 21, and Limburger *v.* Wescott, id. 283, limitations were claimed upon the delivery of similar cards of another express company, and the court held, in both cases, that such delivery did not charge the persons receiving them with knowledge that they contained contracts.

A different construction was put upon the delivery of a similar card, in Hopkins *v.* Wescott, 6 Blatchf. R. 64; but I infer that the learned judge who delivered the opinion intended to decide that something short of an express contract will suffice to screen the carrier from his common-law liability, and that a notice, personally served, which could be read, would have that effect. The attention

of the court does not seem to have been directed to the distinction between such a notice and a contract. The delivery and acceptance of a paper containing the contract may be binding, though not read, provided the business is of such a nature and the delivery is under such circumstances as to raise the presumption that the person receiving it knows that it is a contract, containing the terms and conditions upon which the property is received to be carried. In such a case it is presumed that the person assents to the terms, whatever they may be. This is the utmost extent to which the rule can be carried, without abandoning the principle that a contract is indispensable. The recent case of Grace *v.* Adams, 100 Mass. 560 [220], relied upon by the defendant's counsel, was decided upon this principle. The plaintiff delivered a package of money to an express company, and took a receipt containing a provision exempting the company from liability for loss by fire; and the court held that he knew that the paper contained the conditions upon which the money was to be carried, and was therefore presumed to have assented to them, although he did not read the paper. The court say: "It is not claimed that he did not know, when he took it, that it was a shipping contract, or bill of lading." So, in Van Goll *v.* The S. E. R. Co., 104 Eng. Com. Law R. 75, the same principle was decided. Willes, J., said: "Assuming that the plaintiff did not read the terms of the condition, it is evident she knew they were there." Keating, J., said: "It was incumbent on the company to show that such was the contract." . . . "I think there was evidence that the plaintiff assented to those terms."

As to bills of lading and other commercial instruments of like character, it has been held that persons receiving them are presumed to know, from their uniform character and the nature of the business, that they contain the terms upon which the property is to be carried. But checks for baggage are not of that character, nor is such a card as was delivered in this instance. It was, at least, equivocal in its character. In such a case a person is not presumed to know its contents, or to assent to them.

The circumstances under which the paper was received repel the idea of a contract. No such intimation was made to the plaintiff. He did not, and could not, if he had tried, read it in his seat. It is found that he might have read it at the end of the car, or by the lights on the pier or in the ferry-boat; and it is claimed that he should have done so, and, if dissatisfied, should have expressed his dissent. If he had done so, and in the bustle and confusion incident to such occasions, could have found the messenger and demanded his baggage, the latter might have claimed, upon the theory of this defence, that the contract was completed at the delivery of the paper, and that he had a right to perform it and receive the compensation.

It is impossible to maintain this defence without violating estab-

lished legal principles in relation to contracts. It was suggested on the argument, that the stipulation to charge according to the value of the property is just and proper. This may be true; but the traveller should have something to say about it. The contract cannot be made by one party. If the traveller is informed of the charges graduated by value, he can have a voice in the bargain; but in this case he had none. Whilst the carrier should be protected in his legal right to limit his responsibility, the public should also be protected against imposition and fraud. The carrier must deal with the public upon terms of equality; and, if he desires to limit his liability, he must secure the assent of those with whom he transacts business.

My conclusion is, that no contract was proved.

1. Because it was obscurely printed.

2. Because the nature of the transaction was not such as necessarily charged the plaintiff with knowledge that the paper contained the contract.

3. Because the circumstances attending the delivery of the card repel the idea that the plaintiff had such knowledge, or assented in fact to the terms of the alleged contract.

The order granting a new trial must be affirmed, and judgment absolute ordered for the plaintiff, with costs.

All the judges concurring, upon the ground that no contract limiting the liability of defendants was proved.

Order affirmed and judgment absolute for the plaintiff ordered.

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b. *In case of negligence.*

LIVERPOOL STEAM CO. *v.* PHENIX INS. CO.

129 U. S. 397. 1889.

Mr. Justice Gray. This is an appeal by a steamship company from a decree rendered against it upon a libel in admiralty, "in a cause of action arising from breach of contract," brought by an insurance company, claiming to be subrogated to the rights of the owners of goods shipped on board the "Montana," one of the appellant's steamships, at New York, to be carried to Liverpool, and lost or damaged by her stranding, because of the negligence of her master and officers, in Holyhead Bay, on the coast of Wales, before reaching her destination.

In behalf of the appellant, it was contended that the loss was caused by perils of the sea, without any negligence on the part of master and officers; that the appellant was not a common carrier; that it was exempt from liability by the terms of the bills of lading;

and that the libellant had not been subrogated to the rights of the owners of the goods.

It is to be remembered that the jurisdiction of this court to review the decree below is limited to questions of law, and does not extend to questions of fact. Act of February 16, 1875, c. 77, sec. 1; 18 Stat. 315; The Gazelle, 128 U. S. 474, 484, and cases there cited.

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"On the foregoing facts," the only conclusion of law stated by the Circuit Court (except those affecting the right of subrogation and the amount to be recovered) is in these words: "The stranding of the 'Montana' and the consequent damage to her cargo having been the direct result of the negligence of the master and officers of the steamer, the respondent is liable therefor." Negligence is not here stated as a conclusion of law, but assumed as a fact already found. The conclusion of law is, in effect, that, such being the fact, the respondent is liable, notwithstanding any clause in the bills of lading.

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We are then brought to the consideration of the principal question in the case; namely, the validity and effect of that clause in each bill of lading by which the appellant undertook to exempt itself from all responsibility for loss or damage by perils of the sea, arising from negligence of the master and crew of the ship.

The question appears to us to be substantially determined by the judgment of this court in Railroad Co. *v.* Lockwood, 17 Wall. 357.

That case, indeed, differed in its facts from the case at bar. It was an action brought against a railroad corporation by a drover, who, while being carried with his cattle on one of its trains under an agreement which it had required him to sign, and by which he was to pay certain rates for the carriage of the cattle, to pass free himself, and to take the risks of all injuries to himself or to them, was injured by the negligence of the defendant or its servants.

The judgment for the plaintiff, however, was not rested upon the form of the agreement, or upon any difference between railroad corporations and other carriers, or between carriers by land and carriers by sea, or between carriers of passengers and carriers of goods, but upon the broad ground that no public carrier is permitted by law to stipulate for an exemption from the consequence of the negligence of himself or his servants.

The very question there at issue, defined at the beginning of the opinion as "whether a railroad company, carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage," was stated a little further on in more general terms as "the question before propounded[:] namely, whether common carriers may exempt themselves from liability for negligence;" and a negative answer to the question thus stated was a necessary link in the logical chain of conclusions announced at the end of the opinion as constituting the ratio decidendi. 17 Wall. 359, 363, 384.

The course of reasoning, supported by elaborate argument and illustration, and by copious references to authorities, by which those conclusions were reached, may be summed up as follows:

By the common law of England and America before the Declaration of Independence, recognized by the weight of English authority for half a century afterwards, and upheld by decisions of the highest courts of many States of the Union, common carriers could not stipulate for immunity for their own or their servants' negligence. The English Railway and Canal Traffic Act of 1854, declaring void all notices and conditions made by those classes of common carriers, except such as should be held by the courts or judge before whom the case should be tried to be just and reasonable, was substantially a return to the rule of the common law.

The only important modification by the Congress of the United States of the previously existing law on this subject is the Act of 1851, to limit the liability of ship-owners (Act of March 3, 1851, c. 43; 9 Stat. 635; Rev. Stat. sec. 4282–4289 [**721, 722**]), and that act leaves them liable without limit for their own negligence, and liable to the extent of the ship and freight for the negligence or misconduct of their master and crew.

The employment of a common carrier is a public one, charging him with the duty of accommodating the public in the line of his employment. A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests. Even if the extent of these responsibilities is restricted by law or by contract, the nature of his occupation makes him a common carrier still. A common carrier may become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier is a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of that character.

The fundamental principle, upon which the law of common carriers was established, was to secure the utmost care and diligence in the performance of their duties. That end was effected in regard to goods, by charging the common carrier as an insurer, and in regard to passengers by exacting the highest degree of carefulness and diligence. A carrier who stipulates not to be bound to the exercise of care and diligence seeks to put off the essential duties of his employment.

Nor can those duties be waived in respect to his agents or servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants. The law demands of the carrier

carefulness and diligence in performing the service: not merely an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law.

The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgle or stand out, and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper, that the carrier presents; and in most cases he has no alternative but to do this, or to abandon his business.

Special contracts between the carrier or the customer, the terms of which are just and reasonable and not contrary to public policy, are upheld; such as those exempting the carrier from responsibility for losses happening from accident, or from dangers of navigation that no human skill or diligence can guard against; or for money or other valuable articles, liable to be stolen or damaged — unless informed of their character or value; or for perishable articles or live animals, when injured without default or negligence of the carrier. But the law does not allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions which are unreasonable and improper, amounting to an abnegation of the essential duties of his employment.

It being against the policy of the law to allow stipulations which will relieve the railroad company from the exercise of care and diligence, or which, in other words, will excuse it for negligence in the performance of its duty, the company remains liable for such negligence.

This analysis of the opinion in Railroad Co. *v.* Lockwood shows that it affirms and rests upon the doctrine that an express stipulation by any common carrier for hire, in a contract of carriage, that he shall be exempt from liability for losses caused by the negligence of himself or his servants, is unreasonable and contrary to the public policy, and consequently void. And such has always been the understanding of this court, expressed in several later cases. Express Co. *v.* Caldwell, 21 Wall. 264, 268 [210]; Railroad Co. *v.* Pratt, 22 Wall. 123, 134; Bank of Kentucky *v.* Adams Express Co., 93 U. S. 174, 183; Railway Co. *v.* Stevens, 95 U. S. 655; Hart *v.* Pennsylvania Railroad, 112 U. S. 331, 338; Phœnix Ins. Co. *v.* Erie Transportation Co., 117 U. S. 312, 322; Inman *v.* South Carolina Railway, *ante* [129 U. S.], 128.

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It was argued for the appellant, that the law of New York, the *lex loci contractus*, was settled by recent decisions of the Court of Appeals of that State in favor of the right of a carrier of goods or passengers, by land or water, to stipulate for exemption from all

liability for his own negligence. Mynard *v.* Syracuse Railroad, 77 N. Y. 180.[1] Spinette *v.* Atlas Steamship Co., 80 N. Y. 71.

[1] MYNARD *v.* SYRACUSE, ETC. R. CO.

71 N. Y. 180. 1877.

This action was brought to recover damages for the loss of a steer, while being transported on defendant's road from Syracuse to Binghamton.

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CHURCH, Ch. J. The parties stipulated that the animal was lost by reason of the negligence of some of the employees of the defendant without the fault of the plaintiff. The defence rested solely upon exemption from liability contained in the contract of shipment, by which, for the consideration of a reduced rate, the plaintiff agreed to "release and discharge the said company from all claims, demands, and liabilities of every kind whatsoever for, or on account of, or connected with any damage or injury to or the loss of said stock, or any portion thereof, from whatsoever cause arising."

The question depends upon the construction to be given to this contract, whether the exemption "from whatever cause arising" should be taken to include a loss accruing by the negligence of the defendant or its servants. The language is general and broad. Taken literally it would include the loss in question, and it would also include a loss accruing from an intentional or wilful act on the part of servants. It is conceded that the latter is not included. We must look at the language in connection with the circumstances and determine what was intended and whether the exemption claimed was within the contemplation of the parties.

The defendant was a common carrier, and as such was absolutely liable for the safe carriage and delivery of property intrusted to its care, except for loss or injury occasioned by the acts of God or public enemies. The obligations are imposed by law, and not by contract. A common carrier is subject to two distinct classes of liabilities, — one where he is liable as an insurer without fault on his part; the other, as an ordinary bailee for hire, when he is liable for default in not exercising proper care and diligence; or, in other words, for negligence. General words from whatever cause arising may well be satisfied by limiting them to such ordinary liabilities as carriers are under without fault or negligence on their part.

When general words may operate without including the negligence of the carrier or his servants, it will not be presumed that it was intended to include it. Every presumption is against an intention to contract for immunity for not exercising ordinary diligence in the transaction of any business, and hence the general rule is that contracts will not be so construed, unless expressed in unequivocal terms. In New Jersey Steam Navigation Company *v.* Merchants' Bank, 6 How. [U. S. R.], 344, a contract that the carriers are not responsible in any event for loss or damages was held not intended to exonerate them from liability for want of ordinary care. Nelson, J., said: "The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going further than the intent of the parties upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands." . . . .

These authorities are directly in point, and they accord with the wise public policy by which courts should be guided in the construction of contracts designed to relieve common carriers from obligation to exercise care and diligence in the prosecution of their business, which the law imposes upon ordinary bailees for hire engaged in private business. In the recent case of Lockwood *v.* Railroad Co., 17 Wall. 357, the Supreme Court of the United States decided that a common carrier cannot lawfully stipulate for exemption from responsibility for the negligence of himself or his servants. If we felt at liberty to review the question, the reasoning of Justice Bradley in that case

But on this subject, as on any question depending upon mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by decisions of the courts of the State, but will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law of which the courts of the State have concurrent jurisdiction, and upon a contract made and to be performed within the State. Railroad Co. *v.* Lockwood, 17 Wall. 357, 368; Myrick *v.* Michigan Central Railroad, 107 U. S. 102; Carpenter *v.* Washington Ins. Co., 16 Pet. 495, 511; Swift *v.* Tyson, 16 Pet. 1; Railroad Co. *v.* National Bank, 102 U. S. 14; Burgess *v.* Seligman, 107 U. S. 20, 33; Smith *v.* Alabama, 124 U. S. 365, 478; Bucher *v.* Cheshire Railroad, 125 U. S. 555, 583. The decision of the State courts certainly cannot be allowed any greater weight in the Federal courts when exercising the admiralty and maritime jurisdiction exclusively vested in them by the Constitution of the United States.

It was also argued in behalf of the appellant that the validity and effect of this contract, to be performed principally upon the high seas, should be governed by the general maritime law, and that by that law such stipulations are valid. To this argument there are two answers.

First. There is not shown to be any such general maritime law. The industry of the learned counsel for the appellant has collected articles of codes, decisions of courts, and opinions of commentators in France, Italy, Germany, and Holland, tending to show that, by the law administered in those countries, such a stipulation would be valid. But those decisions and opinions do not appear to have been based on general maritime law, but largely, if not wholly, upon provisions or omissions in the codes of the particular country; and it has been said by many jurists that the law of France, at least, was otherwise. See 2 Pardessus Droit Commercial, no. 542; 4 Goujet & Meyer Dict. Droit Commercial (2d ed.) 2 Voiturier, nos. 1, 81; 2 Tropling Droit Civil, nos. 894, 910, 942, and other books cited in Peninsular & Oriental Co. *v.* Shand, 3 Moore P. C. (n. s.) 272, 278, 285, 286; 25 Laurent Droit Civil Français, no. 532; Mellish, L. J., in Cohen *v.* Southeastern Railway, 2 Ex. D. 253, 257.

Second. The general maritime law is in force in this country, or in any other, so far only as it has been adopted by the laws or usage thereof; and no rule of the general maritime law (if any exists) concerning the validity of such a stipulation as that now before us has ever been adopted in the United States or England, or recog-

would be entitled to serious consideration; but the right thus to stipulate has been [illegible] essentially affirmed by this court that the question cannot with propriety be regarded [illegible] as open now in this State. 8 N. Y. 375; 11 id. 485; 24 id. 181–196; 26 id. 448; 49 id. 216; 50 id. 282; 51 id. 61.

nized in the admiralty courts of either. The Lottawanna, 21 Wall. 558; The Scotland, 105 U. S. 24, 29, 33; The Belganland, 114 U. S. 355, 369; The Harrisburg, 119 U. S. 199; The Hamburg, 2 Moore P. C. (N. S.) 289, 319; s. c. Brown & Lush, 253, 272; Lloyd *v.* Guibert, L. R. 1 Q. B. 115, 123, 124; s. c. 6 B. & S. 100, 134, 136; The Gaetano & Maria, 7 P. D. 137, 143.

It was argued in this court, as it had been below, that as the contract was to be chiefly performed on board of a British vessel and to be finally completed in Great Britain, and the damage occurred in Great Britain, the case should be determined by the British law, and that by that law the clause exempting the appellant from liability for losses occasioned by the negligence of its servants was valid.

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It appears by the cases cited in behalf of the appellant, and is hardly denied by the appellee, that under the existing law of Great Britain, as declared by the latest decisions of her courts, common carriers, by land or sea, except so far as they are controlled by the provisions of the Railway and Canal Traffic Act of 1854, are permitted to exempt themselves by express contract from responsibility for losses occasioned by negligence of their servants. The Duero, L. R. 2 Ad. & Ec. 393; Taubman *v.* Pacific Co., 26 Law Times (N. S.) 704; Steel *v.* State Line Steamship Co., 3 App. Cas. 72; Manchester, etc. R. *v.* Brown, 8 App. Cas. 703. It may therefore be assumed that the stipulation now in question, though invalid by our law, would be valid according to the law of Great Britain.

The general rule as to what law should prevail, in case of a conflict of laws concerning a private contract, was concisely and exactly stated before the Declaration of Independence by Lord Mansfield (as reported by Sir William Blackstone, who had been of counsel in the case) as follows: "The general rule, established *ex comitate et jure gentium* is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But the rule admits of an exception, when the parties (at the time of making the contract) had a view to a different kingdom." Robinson *v.* Bland, 1 W. Bl. 234, 256, 258; s. c. 2 Bur. 1077, 1078.

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This court has not heretofore had occasion to consider by what law contracts like those now before us should be expounded. But it has often affirmed and acted on the general rule that contracts are to be governed as to their nature, their validity, and their interpretation, by the law of the place where they were made, unless the contracting parties clearly appear to have had some other law in view. Cox *v.* United States, 6 Pet. 172; Scudder *v.* Union Bank, 91 U. S. 406; Pritchard *v.* Norton, 106 U. S. 124; Lamar *v.* Micou, 114 U. S. 218; Watts *v.* Camors, 115 U. S. 353, 362.

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This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence, of authority, the general rule that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country.

There does not appear to us to be anything in either of the bills of lading in the present case tending to show that the contracting parties looked to the law of England, or to any other law than to that of the place where the contract was made.

The bill of lading for the bacon and hams was made and dated at New York, and signed by the ship's agent there. It acknowledges that the goods have been shipped "in and upon the steamship called Montana, now lying in the port of New York and bound for the port of Liverpool." It contains no indication that the owners of the steamship are English, or that their principal place of business is in England, rather than in this country. On the contrary, the only description of the line of steamships or of the place of business of their owners, is in a memorandum in the margin, as follows: "Guion Line. United States Mail Steamers. New York: 29 Broadway. Liverpool: 11 Rumford St." No distinction is made between the places of business at New York and at Liverpool, except that the former is named first. The reservation of liberty, in case of an interruption of the voyage, "to transship the goods by any other steamer," would permit transshipment into a vessel of any other line, English or American. And general average is to be computed, not by any local law or usage, but "according to York-Antwerp rules," which are the rules drawn up in 1864 at York in England, and adopted in 1877 at Antwerp in Belgium, at international conferences of representatives of the more important mercantile associations of the United States, as well as of the maritime countries of Europe. Lowndes on General Average (3d ed.), Appendix Q.

The contract being made at New York, the shipowner having a place of business there, and the shipper being an American, both parties must be presumed to have submitted themselves to the law there prevailing, and to have agreed to its action upon their contract. The contract is a single one, and its principal object, the transportation of the goods, is one continuous act, to begin in the port of New York, to be chiefly performed on the high seas, and to end at the port of Liverpool. The facts that the goods are to be delivered at Liverpool, and the freight and primage, therefore, payable there in sterling currency, do not make the contract an English

contract, or refer to the English law the question of the liability of the carrier for the negligence of the master and crew in the course of the voyage. Peninsular & Oriental Co. *v.* Shand,[1] Lloyd *v.* Guibert;[2] and Chartered Bank of India *v.* Netherlands Steam Navigation Co.,[3] before cited.

There is even less ground for holding the three bills of lading of the cotton to be English contracts. Each of them is made and dated at Nashville, an inland city, and is a through bill of lading, over the Louisville and Nashville Railroad and its connections, and by the Williams and Guion Steamship Company, from Nashville to Liverpool; and the whole freight from Nashville to Liverpool is to be "at the rate of fifty four pence sterling per 100 lbs. gross weight." It is stipulated that the liability of the Louisville and Nashville Railroad and its connections as common carriers "terminates on delivery of the goods or property to the steamship company at New York, when the liability of the steamship commences, and not before;" and that "the property shall be transported from the port of New York to the port of Liverpool by the said steamship company, with liberty to ship by any other steamship or steamship line." And in the margin is this significant reference to a provision of the statutes of the United States, applicable to the ocean transportation only: "Attention of shippers is called to the Act of Congress of 1851: 'Any person or persons shipping oil of vitriol, unslacked lime, inflammable matches (or) gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering at the time of shipment a note in writing, expressing the nature and character of such merchandise, to the master, mate, or officer, or person in charge of the loading of the ship or vessel, shall forfeit to the United States One Thousand Dollars.'" Act of March 3, 1851, c. 43, sec. 7; 9 Stat. 636; Rev. Stat. sec. 4288 [**722**].

It was argued that as each bill of lading, drawn up and signed by the carrier and assented to by the shipper, contained a stipulation that the carrier should not be liable for losses by perils of the sea arising from the negligence of its servants, both parties must be presumed to have intended to be bound by that stipulation, and must, therefore, the stipulation being void by our law and valid by the law of England, have intended that their contract should be governed by the English law; and one passage in the judgment in Peninsular & Oriental Co. *v.* Shand gives some color to the argument. 3 Moore P. C. (N. S.) 291. But the facts of the two cases are quite different in this respect. In that case, effect was given to the law of England, where the contract was made; and both parties were English, and must be held to have known the law of their own

[1] 3 Moore P. C. (N. S.) 272.
[2] 6 B. & S. 100; s. c. L. R. 1 Q. B. 115.
[3] 9 Q. B. D. 118, and 10 Q. B. D. 521.

country. In this case, the contract was made in this country, between parties one residing and the other doing business here; and the law of England is a foreign law, which the American shipper is not presumed to know. Both parties or either of them may have supposed the stipulation to be valid; or both or either may have known that by our law, as declared by this court, it was void. In either aspect, there is no ground for inferring that the shipper, at least, had any intention, for the purpose of securing its validity, to be governed by a foreign law, which he is not shown, and cannot be presumed, to have had any knowledge of.

Our conclusion on the principal question in the case may be summed up thus. Each of the bills of lading is an American and not an English contract, and, so far as concerns the obligation to carry the goods in safety, is to be governed by the American law, and not by the law, municipal or maritime, of any other country. By our law, as declared by this court, the stipulation by which the appellant undertook to exempt itself from liability for the negligence of its servants is contrary to public policy and therefore void; and the loss of the goods was a breach of the contract, for which the shipper might maintain a suit against the carrier. This being so, the fact that the place where the vessel went ashore, in consequence of the negligence of the master and officers in the prosecution of the voyage, was upon the coast of Great Britain, is quite immaterial.

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c. *Agreed Valuation.*

GRAVES v. LAKE SHORE, ETC. R. CO.

137 Mass. 33. 1884.

MORTON, C. J. The defendant, as a common carrier, received at Peoria, Illinois, seventy-five barrels of high wines, and agreed to deliver them to the plaintiffs at Boston, in this Commonwealth. The bill of lading contained the stipulation that the goods were "shipped at an agreed valuation of $20 per bbl., owner's risk of leakage." It also contained the agreement that, "in the event of the loss of any property for which responsibility attaches under this bill of lading to the carriers, the value or cost of the same at the time and point of shipment is to govern the settlement, except the value of the articles has been agreed upon with the shipper, or is determined by the classification upon which the rates are based."

The defendant had no knowledge of the value of the goods except that furnished by the statement of the shippers, and the charge for transportation was based upon this statement and valuation. The

goods were destroyed during the transit by a collision of two trains, occasioned by the negligence of the servants of the defendant. The only question presented is whether the plaintiffs can recover any more than the agreed valuation of the goods.

The question whether a carrier can, by a special contract, exempt himself from liability for a loss arising from the negligence of himself or his servants, is one which has been much discussed, and upon which the adjudications are conflicting. If we adopt the general rule, that a carrier cannot thus exempt himself from responsibility, we are of the opinion that it does not cover the case before us, which must be governed by other considerations. The defendant has not attempted to exempt itself from liability for the negligence of its servants. It has made no contract for that purpose, but admits its responsibility; its claim is, that the plaintiffs, having represented and agreed that the goods are of a specified value, and having thus obtained the benefit of a diminished rate of transportation, are now estopped to claim, in contradiction of their representation and agreement, that the goods are of a greater value.

It is the right of the carrier to require good faith on the part of those persons who deliver goods to be carried, or enter into contracts with him. The care to be exercised in transporting property, and the reasonable compensation for its carriage, depend largely on its nature and value, and such persons are bound to use no fraud or deception which would mislead him as to the extent of the duties or the risks which he assumes. It is just and reasonable that a carrier should base his rate of compensation, to some extent, upon the value of the goods carried; this measures his risks, and is an important element in fixing his compensation. If a person voluntarily represents and agrees that the goods delivered to a carrier are of a certain value, and the carrier is thereby induced to grant him a reduced rate of compensation for the carriage, such person ought to be barred by his representation and agreement. Otherwise, he imposes upon the carrier the obligations of a contract different from that into which he has entered. Dunlap *v.* International Steamboat Co., 98 Mass. 371; Judson *v.* Western Railroad, 6 Allen, 486 [**185**].

The plaintiffs admit that their valuation of the goods would be conclusive against them in case of a loss from any other cause than the negligence of the carrier or its servants; but contend that the contract does not fairly import a stipulation of exemption from responsibility for such negligence. We cannot see the justice of this distinction. Looking at the matter practically, everybody knows that the charges of a carrier must be fixed with reference to all the risks of the carriage, including the risk of loss from the negligence of servants. In the course of time, such negligence is inevitable, and the business of a carrier could not be carried on unless

he includes this risk in fixing his rates of compensation. When the parties in this case made their contract, it is fair to assume that both had in mind all the usual risks of the carriage. It savors of refinement to suppose that they understood that the valuation of the goods was to be deemed to be fixed if a loss occurred from some causes, but not fixed if it occurred from the negligence of the servants of the carrier. Such does not seem to us to be the fair construction of the contract.

The plaintiffs voluntarily entered into the contract with the defendant; no advantage was taken of them; they deliberately represented the value of the goods to be $20 per barrel. The compensation for carriage was fixed upon this value; the defendant is injured and the plaintiffs are benefited by this valuation, if it can now be denied. We are of opinion that the plaintiffs are estopped to show that it was of greater value than that represented. The plaintiffs cannot recover a larger sum without violating their own agreement. Although one of the indirect effects of such a contract is to limit the extent of the responsibility of the carrier for the negligence of his servants, this was not the purpose of the contract. We cannot see that any considerations of a sound public policy require that such contracts should be held invalid, or that a person, who in such contract fixes a value upon his goods which he intrusts to the carrier, should not be bound by his valuation. M'Cance *v.* London & North Western Railway, 7 H. & N. 437; s. c. 3 H. & C. 343; Railroad *v.* Fraloff, 100 U. S. 24 [**41**]; Muser *v.* Holland, 17 Blatchf. C. C. 412; s. c. 1 Fed. Rep. 382; Hart *v.* Pennsylvania Railroad, 2 McCrary, 333; s. c. 7 Fed. Rep. 630; Magnin *v.* Dinsmore, 70 N. Y. 410.

We are therefore of opinion, upon the facts of this case, that it was not competent for the plaintiffs to show that the value of the goods lost was greater than $20 per barrel.[1]

Judgment affirmed.

[1] *Acc.*: Hart *v.* Penn'a. R. Co., 112 U. S. 331; Ballou *v.* Earle, 17 R. I. 441.

With great deference for those who may differ with us, we think it entirely illogical and unreasonable to say that the carrier *may not* absolve itself from liability for the *whole* value of property lost or destroyed through its negligence, but that it may absolve itself from responsibility for one-half, three-fourths, seven-eighths, nine-tenths, or ninety-hundredths of the loss so occasioned. With great unanimity the authorities say it cannot do the *former*. If allowed to do the *latter*, it may thereby substantially evade and nullify the law which says it shall not do the *former*, and in that way do indirectly what it is forbidden to do directly. We hold that it can do neither. The requirement of the law has ever been, and is now, that the common carrier shall be diligent and careful in the transportation of its freight, and public policy forbids that it shall throw off that obligation, whether by stipulation for exemption in *whole* or *in part* from the consequences of its negligent acts. This view is sustained by sound reason, and also by the weight of authority. Coward *v.* Railroad Company, 19 Iowa, 278; Moulton *v.* St. P., M. and M. Railway Company, 31 Minn. 85; Railroad Company *v.* Simpson, 30 Kan. 645; Railroad Company *v.* Aldes, 30 Mich. 251; U. S. Express Company *v.* Blackman, 28 Ohio St. 144; Black *v.* G.

McFADDEN *v.* MISSOURI PACIFIC R. CO.

92 Mo. 343. 1887.

RAY, J. . . . . .

But the stipulation in the contract of shipment, most relied on for a reversal of the judgment, is the one declaring the company should not be liable for more than one hundred dollars per head for the mules. Such a stipulation, it is claimed, is valid and binding, and does not contravene the rule which forbids the carrier to stipulate against his own negligence. Numerous decisions sustain such stipulations, when fairly made, and when the parties agree on a fixed valuation of the property, and a special and reduced rate of freight is given and received, based upon the condition that the carrier assumes liability only to the extent of the agreed value of the property. Hart *v.* Railroad, 112 U. S. 331, and cases cited.

Other decisions deny the validity of such provisions, and hold them void, as releasing the carrier from the *full and proper* liability for the consequences of his negligence. Black *v.* Trans. Co., 55 Wis. 319; Moulton *v.* Railroad, 31 Minn. 85; U. S. Express Co. *v.* Backman, 28 Ohio St. 144. Hutchinson on Carriers says, in substance, that the cases cited by him as recognizing the right of the carrier to thus limit the liability as to value occur in States in which the law permits the carrier, by special and express contract, to relieve himself of the consequences of his negligence in the carriage of goods, and that these cases must not be considered controlling authority in those States in which such claim to exemption is not permitted to be made. Secs. 247, 250.

But, even under the rule declared in the former class of decisions, these provisions, thus employed and resorted to by common carriers to restrict their liability, are to be tested by their fairness, justice, and reasonableness. We will consider the case before us briefly under this view. The answer charges that defendant agreed to transport the mules for plaintiff, between said points, at the rate of

T. Company, 55 Wis. 319; A. G. S. Railroad *v.* Little, 71 Ala. 611. See also Rosenfield *v.* Railway Company, 103 Ind. 121; M. P. Railroad Company *v.* Fagan, 35 Am. and Eng. Railroad Cases, 666; 97 Ill. 525; s. c. 34 Am. R. 197.

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The rule is the same now, except that in this day of special contracts it has been relaxed so that the carrier may exonerate itself from responsibility by either showing that the case falls within one of the exceptions of the common law or within one of the stipulations of the special contract. 2 Greenleaf Evi., sec. 219; 52 Ala. 606; 71 Ala. 611; 7 Yer. 340; 8 Hum. 498; 9 Bax. 188; 2 Lea, 296; 2 Pickle, 393; 63 Pa. St. 14; 36 Minn. 539; s. c. 1 Am. St. R. 692; 60 Miss. 1017; 28 Ohio St. 144; 55 Wis. 319; Lawson on Con. of Car., secs. 245, 246, 247, and 248; Hutchinson on Car. sec. 764; Schouler on Bail. and Car., sec. 439. . . . . Caldwell, J., in Railway Co. *v.* Wynn, 88 Tenn. 320. 1889.

thirty-one dollars per car, which was charged to be a special and reduced rate, lower than the regular rate. The written contract, read in evidence, recited that the said rate was a reduced rate, made in consideration of agreement, etc. . . . . .

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The reduced rate, if such it was, was the consideration for the exemption from liability beyond the one hundred dollars, even in case of injury and loss from defendant's negligence, and parol evidence in that behalf is, we think, competent and admissible for the purpose indicated. The consideration clause in bills of lading, contracts, deeds, and other instruments, ordinarily, has only the force and effect of a receipt, and is open to explanation and contradiction by parol evidence. Hutchinson on Carriers, secs. 122, 123; Fontaine *v.* Boatman's Sav. Inst., 57 Mo. 552; Hollocher *v.* Hollocher, 62 Mo. 267; Edwards *v.* Smith, 63 Mo. 119.

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If, in the one case, it is competent for the carrier to show that the real value of the property was concealed, and the lower rate thus secured by the fraud or deceit of the shipper, why may not the shipper be permitted to show that the alleged reduced rate, in consideration of which he surrendered obligation imposed by law upon the carrier, as an insurer of the property, was false and in fact no reduced rate at all? It may be that plaintiff was not deceived by it, at the time, as he did not ask for, or suppose he was getting a reduced rate, but if the pretended lower rate was the usual rate, and known to be such to both parties, it would work a fraud upon the rights of plaintiff, under the law, if the defendant were permitted to treat it as a lower rate, and to thus deprive plaintiff of important rights, and thus secure release of part of its liability, by reason thereof.

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d. *Time for claiming damages.*

EXPRESS CO. *v.* CALDWELL.

21 Wall. (U. S.), 264. 1874.

Caldwell sued the Southern Express Company in the court below, as a common carrier, for its failure to deliver at New Orleans a package received by it on the 23d day of April, 1862, at Jackson, Tennessee,—places the transit between which requires only about one day. The company pleaded that when the package was received "it was agreed between the company and the plaintiff, and made one of the express conditions upon which the package was received, that the company should not be held liable for any loss of, or damage to,

the package whatever, unless claim should be made therefor within ninety days from its delivery to it." The plea further averred that no claim was made upon the defendant, or upon any of its agents, until the year 1868, more than ninety days after the delivery of the package to the company, and not until the present suit was brought. To the plea thus made the plaintiff demurred generally, and the Circuit Court sustained the demurrer, giving judgment thereon against the company. Whether this judgment was correct was the question now to be passed on here.

Mr. Justice Strong. Notwithstanding the great rigor with which courts of law have always enforced the obligations assumed by common carriers, and notwithstanding the reluctance with which modifications of that responsibility, imposed upon them by public policy, have been allowed, it is undoubtedly true that special contracts with their employers limiting their liability are recognized as valid, if in the judgment of the courts they are just and reasonable, — if they are not in conflict with sound legal policy. The contract of a common carrier ordinarily is an assumption by him of the exact duty which the law affixes to the relation into which he enters when he undertakes to carry. That relation the law regards as substantially one of insurance against all loss or damage except such as results from what is denominated as the act of God or of the public enemy. But the severe operation of such a rule in some cases has led to a relaxation of its stringency, when the consignor and the carrier agree to such a relaxation. All the modern authorities concur in holding that, to a certain extent, the extreme liability exacted by the common law originally may be limited by express contract. The difficulty is in determining to what extent, and here the authorities differ. Certainly it ought not to be admitted that a common carrier can be relieved from the full measure of that responsibility which ordinarily attends his occupation without a clear and express stipulation to that effect obtained by him from his employer. And even when such a stipulation has been obtained, the court must be able to see that it is not unreasonable. Common carriers do not deal with their employers on equal terms. There is, in a very important sense, a necessity for their employment. In many cases they are corporations chartered for the promotion of the public convenience. They have possession of the railroads, canals, and means of transportation on the rivers. They can and they do carry at much cheaper rates than those which private carriers must of necessity demand. They have on all important routes supplanted private carriers. In fact, they are without competition, except as between themselves, and that they are thus is in most cases a consequence of advantages obtained from the public. It is, therefore, just that they are not allowed to take advantage of their powers and of the necessities of the public to exact exemptions from that measure of duty which public policy demands. But that which was public

policy a hundred years ago has undergone changes in the progress of material and social civilization. There is less danger than there was of collusion with highwaymen. Intelligence is more rapidly diffused. It is more easy to trace a consignment than it was. It is more difficult to conceal fraud. And, what is of equal importance, the business of common carriers has been immensely increased and subdivided. The carrier who receives goods is very often not the one who is expected to deliver them to the ultimate consignees. He is but one link of a chain. Thus his hazard is greatly increased. His employers demand that he shall be held responsible, not merely for his own acts and omissions, and those of his agents, but for those of other carriers whom he necessarily employs for completing the transit of goods. Hence, as we have said, it is now the settled law that the responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable and not inconsistent with sound public policy. This subject has been so fully considered of late in this court that it is needless to review the authorities at large. In York Company *v.* The Central Railroad Company,[1] it is ruled that the common-law liability of a common carrier may be limited and qualified by special contract with the owner, provided such special contract do not attempt to cover losses by negligence or misconduct. And in a still later case, Railroad Company *v.* Lockwood,[2] where the decisions are extensively reviewed, the same doctrine is asserted. The latter case, it is true, involved mainly an inquiry into the reasonableness of an exception stipulated for, but it unequivocally accepted the rule asserted in the first-mentioned case. The question, then, which is presented to us by this record is, whether the stipulation asserted in the defendant's plea is a reasonable one, not inconsistent with sound public policy.

It may be remarked, in the first place, that the stipulation is not a conventional limitation of the right of the carrier's employer to sue. He is left at liberty to sue at any time within the period fixed by the Statute of Limitations. He is only required to make his claim within ninety days, in season to enable the carrier to ascertain what the facts are, and, having made his claim, he may delay his suit.

It may also be remarked that the contract is not a stipulation for exemption from responsibility for the defendants' negligence, or for that of their servants. It is freely conceded that had it been such, it would have been against the policy of the law, and inoperative. Such was our opinion in Railroad Company *v.* Lockwood. A common carrier is always responsible for his negligence, no matter what his stipulation may be. But an agreement that in case of failure by the carrier to deliver the goods, a claim shall be made by

[1] 3 Wallace, 107. [2] 17 Id. 357.

the bailor, or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity, which the strictest rules of the common law ever required. And it is intrinsically just, as applied to the present case. The defendants are an express company. We cannot close our eyes to the nature of their business. They carry small parcels easily lost or mislaid, and not easily traced. They carry them in great numbers. Express companies are modern conveniences, and notoriously they are very largely employed. They may carry, they often do carry hundreds, even thousands of packages daily. If one be lost, or alleged to be lost, the difficulty of tracing it is increased by the fact that so many are carried, and it becomes greater the longer the search is delayed. If a bailor may delay giving notice to them of a loss, or making a claim indefinitely, they may not be able to trace the parcels bailed, and to recover them, if accidentally missent, or if they have in fact been properly delivered. With the bailor the bailment is a single transaction, of which he has full knowledge; with the bailee, it is one of a multitude. There is no hardship in requiring the bailor to give notice of the loss if any, or make a claim for compensation within a reasonable time after he has delivered the parcel to the carrier. There is great hardship in requiring the carrier to account for the parcel long after that time, when he has had no notice of any failure of duty on his part, and when the lapse of time has made it difficult, if not impossible, to ascertain the actual facts. For these reasons such limitations have been held valid in similar contracts, even when they seem to be less reasonable than in the contracts of common carriers.

Policies of fire insurance, it is well known, usually contain stipulations that the insured shall give notice of a loss, and furnish proofs thereof within a brief period after the fire, and it is undoubted that if such notice and proofs have not been given in the time designated or have not been waived, the insurers are not liable. Such conditions have always been considered reasonable, because they give the insurers an opportunity of inquiring into the circumstances and amount of the loss, at a time when inquiry may be of service. And, still more, conditions in policies of fire insurance that no action shall be brought for the recovery of a loss unless it shall be commenced within a specified time, less than the statutory period of limitations, are enforced, as not against any legal policy.[1]

Telegraph companies, though not common carriers, are engaged in a business that is in its nature almost, if not quite, as important to the public as that of carriers. Like common carriers, they cannot

[1] See Riddlesbarger *v.* Hartford Insurance Company, 7 Wallace, 386, and the numerous cases therein cited.

contract with their employers for exemption from liability for the consequences of their own negligence. But they may by such contracts, or by their rules and regulations brought to the knowledge of their employers, limit the measure of their responsibility to a reasonable extent. Whether their rules are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier. And in Wolf *v.* The Western Union Telegraph Company,[1] a case where one of the conditions of a telegraph company, printed in their blank forms, was that the company would not be liable for damages in any case where the claim was not presented in writing within sixty days after sending the message, it was ruled that the condition was binding on an employer of the company who sent his message on the printed form. The condition printed in the form was considered a reasonable one, and it was held that the employer must make claim according to the condition, before he could maintain an action. Exactly the same doctrine was asserted in Young *v.* The Western Union Telegraph Company.[2]

In Lewis *v.* The Great Western Railway Company,[3] which was an action against the company as common carriers, the court sustained as reasonable stipulations in a bill of lading, that "no claim for deficiency, damage, or detention would be allowed, unless made within three days after the delivery of the goods, nor for loss, unless made within seven days from the time they should have been delivered." Under the last clause of this condition the onus was imposed upon the shipper of ascertaining whether the goods had been delivered at the time they should have been, and in case they had not, of making his claim within seven days thereafter. In the case we have now in hand the agreement pleaded allowed ninety days from the delivery of the parcel to the company, within which the claim might be made, and no claim was made until four years thereafter. Possibly such a condition might be regarded as unreasonable, if an insufficient time were allowed for the shipper to learn whether the carrier's contract had been performed. But that cannot be claimed here. The parcel was received at Jackson, Tennessee, for delivery at New Orleans. The transit required only about one day. We think, therefore, the limitation of the defendants' common-law liability, to which the parties agreed, as averred in the plea, was a reasonable one, and that the plea set up a sufficient defence to the action.

We have been referred to one case which seems to intimate, and perhaps should be regarded as deciding, that a stipulation somewhat like that pleaded here is insufficient to protect the carrier. It is the Southern Express Company *v.* Caperton.[4] There the receipts for the goods contained a provision that there should be no liability

[1] 42 Pennsylvania State, 82.
[2] 34 New York Superior Court, 230.
[3] 3 Hurlstone & Norman, 867.
[4] 44 Alabama, 101.

for any loss unless the claim therefor should be made in writing, at the office of the company at Stevenson, within thirty days from the date of the receipt, in a statement to which the receipt should be annexed. The receipt was signed by the agent of the company alone. It will be observed that it was a much more onerous requirement of the shipper than that made in the present case, and more than was necessary to give notice of the loss to the carrier. The court, after remarking that a carrier cannot avoid his responsibility by any mere general notice, nor contract for exemption from liabilities for his negligence or that of his servants, added that he could not be allowed to make a statute of limitations so short as to be capable of becoming a means of fraud; that it was the duty of the "defendant to deliver the package to the consignee, and that it was more than unreasonable to allow it to appropriate the property of another by a failure to perform a duty, and that too under the protection of a writing signed only by its agent, the assent to which by the other party was only proven by his acceptance of the paper." This case is a very unsatisfactory one. It appears to have regarded the stipulation as a statute of limitations, which it clearly was not, and it leaves us in doubt whether the decision was not rested on the ground that there was no sufficient evidence of a contract. The case cited from 36 Georgia, 532, has no relation to the question before us. It has reference to the inquiry, what is sufficient proof of an agreement between the shipper and the carrier, an inquiry that does not arise in the present case, for the demurrer admits an express agreement.

Our conclusion, then, founded upon the analogous decisions of courts, as well as upon sound reason, is that the express agreement between the parties averred in the plea was a reasonable one, and hence that it was not against the policy of the law. It purported to relieve the defendants from no part of the obligation of a common carrier. They were bound to the same diligence, fidelity, and care as they would have been required to exercise if no such agreement had been made. All that the stipulation required was that the shipper, in case the package was lost or damaged, should assert his claim in season to enable the defendants to ascertain the facts; in other words, that he should assert it within ninety days. It follows that the Circuit Court erred in sustaining the plaintiff's demurrer to the plea.

Judgment reversed.

SPRAGUE *v.* MISSOURI PACIFIC R. CO.

34 Kan. 347. 1885.

Action by Sprague against the Railway Company, to recover $500 damages. Judgment for defendant. Plaintiff brings the case here. The opinion states the material facts.

Johnston, J. S. Sprague brought this action in the District Court of Cloud County against the Missouri Pacific Railway Company, alleging, in substance, that the defendant was a common carrier, and that on or about the 2d day of March, 1883, for a valuable consideration, the railway company undertook and agreed with the plaintiff to safely carry over its road from Atchison to Concordia certain stock, goods, wares, and merchandise; that he delivered the property mentioned for shipment in good condition at Atchison, but the defendant negligently and carelessly managed the car upon which the property was shipped, and by reason of such negligence and without any fault on the part of the plaintiff, four of the horses so shipped by the plaintiff were thrown down, bruised, and injured so that one of them died, and the others were more or less disabled, to the damage of plaintiff in the sum of $500. The railway company denied the allegations of negligence, and the terms of the contract as stated by the plaintiff, and alleged that the property had been shipped in accordance with the terms of a special agreement entered into between the plaintiff and the defendant, wherein it was stated that the company transported livestock only in accordance with certain rules and regulations, which were mentioned, and that, in consideration that the defendant company would transport for the said plaintiff the said property at the rate of $30 per car, the same being a special rate lower than the regular rate mentioned in the freight tariff of the railway company, and other considerations, the plaintiff agreed to release the defendant from some of the responsibility and risks imposed by law upon the railway company when acting as a common carrier. The contract is set out at length in the answer, and it provided that the plaintiff should load and unload his stock at his own risk, and feed, water, and attend to the same at his own expense. He was also to accompany and care for the stock while it was being transported over the defendant's road, and for that purpose the railway company was to furnish the plaintiff free transportation over its road for one person from the point of shipment to the destination.

Among the stipulations of the contract is the following: —

"And for the consideration before mentioned, said party of the second part further agrees that as a condition precedent to his right to recover any damages for any loss or injury to said stock, he will give notice in writing of his claim therefor to some officer of said

party of the first part, or its nearest station agent, before said stock is removed from the place of destination above mentioned, or from the place of the delivery of the same to the said party of the second part, and before such stock is mingled with other stock."

The defendant then alleged that the horses were unloaded and taken from the car at Clifton by the duly-authorized agent of the plaintiff, who refused the defendant the right to transport the same to Concordia, and that when he obtained possession of the same he was well aware of their condition, and well knew whether they had sustained any injury or damage; and that neither the plaintiff nor any one acting for him, prior to the commencement of this action, made any demand in writing for any damages sustained to said stock, and never at any time gave any notice in writing of plaintiff's claim for any damages, loss, or injuries to said stock, to defendant, or any of its officers or agents. The reply of the plaintiff was a general denial, not verified. Upon the trial it was expressly admitted that the special contract set up in defendant's answer was signed and executed by the duly-authorized agents of the parties, and it was further admitted that if the plaintiff is entitled to recover under the contract for the injuries alleged by the plaintiff, the amount of such recovery should be $300. Testimony was then offered by the plaintiff to the effect that the horses were in good condition when delivered to the railway company at Atchison, Kansas. His brother was given a free pass over the road and accompanied the train upon which the horses were shipped, for the purpose of caring for the stock while it was being transported over the defendant's road. At several points on the route he inspected them, and found them to be still in good condition. At the station named Palmer, some distance east of Concordia, the horses were again examined by the plaintiff's brother, and were then all right, and after returning to the caboose and before leaving that station, he felt several jars, but was unable to state what occasioned them, or whether the horses were injured thereby. Upon arriving at Clifton, the next station, he again examined the horses and found that some of them were lying down, and apparently injured. He then demanded of the conductor that the car in which the horses were shipped should be backed up to the stockyards in order that the horses might be removed from the car. This was done, when the horses were unloaded and found to be considerably bruised. He then refused to reload the horses upon the car, took possession of them, and caused them to be taken across the country to the plaintiff's farm, which was not far distant. The plaintiff further testified that when the car reached Concordia, he paid the price agreed upon for the transportation of the same; but that no notice has ever been given to the conductor of that train, or to any officer or agent of the railway company, prior to the commencement of this action, that he claimed any damages for the injury to his stock; that he knew the condition

of the horses and the extent of the injury to them before they were taken to the farm, and yet he had not given any notice of any claim therefor. When the plaintiff closed his testimony, the railway company interposed a demurrer to the evidence, which the court, after consideration, sustained.

Upon this ruling the plaintiff raises and discusses several questions here, but as one of them disposes of the case, the others require no attention. If the contract of the parties, by which it was agreed that before the plaintiff could recover damages for any injury to his horses, is to be upheld, he must give notice in writing of his claim therefor, to some officer of the railway company, or to its nearest station agent, before the horses were removed from the place of destination or from the place of the delivery of the same to the plaintiff, and before they were mingled with other stock, then the demurrer to the evidence was rightly sustained, and the judgment should be affirmed. The plaintiff contends that the agreement is not binding upon him, because it is not one permitted by the laws to be made, and for further reason that it is without consideration. As a general rule, common carriers are held liable as insurers, and are absolutely responsible for any loss to the property intrusted to them, unless such loss is occasioned by the act of God, or the public enemy. It is now a well-established rule of law that this liability may be limited to a certain extent; but to accomplish this it must clearly appear that the shipper understood and assented to the limitation. Common carriers are not permitted, by agreement or otherwise, to exempt themselves from liability for loss occasioned by their negligence or misconduct. Such limitations are held to be against the policy of the law, and would be void. But it is no longer questioned that they may, by special agreement, stipulate for exemption from the extreme liability imposed by the common law, provided that such stipulations are just and reasonable and do not contravene any law or a sound public policy. That the agreement in question was executed by the plaintiff, is admitted, not only by the pleadings, but it was expressly agreed to by him upon the trial. There is no pretence that any deceit or fraud was practised upon him by the railway company in obtaining his assent to the agreement. So far as appears in the testimony, it was fairly and understandingly entered into and executed. His authorized agent, who accompanied the horses, and who had them in charge while passing over defendant's road, knew of this provision of the contract, and was acquainted with their condition before they were taken from the possession of the railway company. And the plaintiff, with full knowledge of this requirement, paid the freight charges agreed upon, after the injury had been done, without complaint, and without claiming any damages therefor; and gave no notice, nor did he make any claim for damages prior to the commencement of this action.

The stipulation requiring notice of any claim for damages to be given cannot be regarded as an attempt to exonerate the company from negligence or from the negligence or misfeasance of any of its servants. The company concedes that such an agreement would be ineffectual for that purpose. It is to be regarded rather as a regulation for the protection of the company from fraud and imposition in the adjustment and payment of claims for damages by giving the company a reasonable opportunity to ascertain the nature of the damage and its cause. After the property has been taken from its possession and mingled with other property of a like kind, the difficulty of inquiring into the circumstances and character of the injury would be very greatly increased. That such a provision does not contravene public policy, and that it is just and reasonable, has been expressly adjudicated by this court. In Goggin *v.* K. P. Rly. Co., 12 Kas. 416, a limitation substantially like the one in question was under consideration, and the circumstances of that case were much like those of the present one. It was there, as here, urged in support of the reasonableness and justice of the regulation, that the defendant was, at the time of the alleged injury, engaged in transporting great numbers of cattle and horses over its line of road, and which were being shipped to different points thereon, and that it would have been impossible for it to have distinguished one car-load from another, unless its attention was called immediately thereto, and that the object of the notice and demand mentioned in the contract was to relieve it from any false or fictitious claim, and to give it an opportunity to have an inspection of the stock before they were removed or mingled with others, and the company could thus have an opportunity to ascertain and allow the actual damages suffered. These reasons are said to be cogent; and the agreement is there held to be reasonable, just, and valid. The decision in that case governs the one at bar, and the view which we have taken of the validity of this limitation accords with the decisions of other courts, among which the following may be cited: Rice *v.* K. P. Rly. Co., 63 Mo. 314; Oxley *v.* St. Louis, Kans s City & Northern Rly., 65 id. 629; Express Co. *v.* Caldwell, 21 Wall. 264 [**210**]; Dawson *v.* St. Louis, Kansas City & Northern Rly., 76 Mo. 514; Texas Central Rly. Co. *v.* Morris, 16 Am. & Eng. Rld. Cases, 259, and cases there cited.

The plaintiff makes the further objection to the special agreement, that it was without consideration. It appears that the rate to be paid for the car in which the horses were shipped was omitted from the contract, and the plaintiff urges that as the price is not stated, it does not appear that any concession or reduction was made from the established rates, and therefore there was no consideration for the stipulation in question. But that position cannot be maintained. The contract was in writing, and signed by the parties to be bound thereby, and by virtue of our statute it imports a consid-

eration. Gen. Stat. ch. 21, § 7. If more was needed to show that the objection is not well founded, it might be found in the plaintiff's petition, where he alleges that the contract was based upon a valuable consideration; and in his testimony, where it appears that $30 was the rate agreed upon and the amount that was paid by him under the contract. When these things are taken in connection with the statement in the written contract, that the price agreed upon was a reduction from the established rates, the consideration for the stipulation in question is sufficiently shown.

It follows from what has been said, that the judgment of the District Court should be affirmed.

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e. *Consignee bound.*

GRACE *v.* ADAMS.

100 Mass. 505. 1868.

Contract, against the defendants, who carried on business under the name of the Adams Express Company, to recover the value of a package of money. In the Superior Court, judgment was ordered for the plaintiff on agreed facts, and the defendants appealed. The agreed facts were as follows: —

"It is agreed that the plaintiff delivered to the Adams Express Company, as common carriers, at Wilmington, in the State of North Carolina, March 21, 1865, a package containing one hundred and fifty dollars, directed to Patrick Corbett, Taunton, Massachusetts, and the said Express Company at the same time delivered to the plaintiff a bill of lading, a copy whereof is hereto annexed, and which makes part of this statement; that the said Express Company shipped said package with other packages from Wilmington by the steamship 'General Lyon,' which ship was accidentally burnt at sea, and said package thereby destroyed. It is further agreed, if evidence of the fact be admissible, that the plaintiff would testify that when the plaintiff delivered the package and took the bill of lading, a copy of which is annexed, he did not read the same."

The material parts of the bill of lading, of which the copy was annexed, were as follows: —

"Adams Express Company. Great Eastern, Western & Southern Express Forwarders. $150. Form 5. Wilmington, March 21, 1865. Received from —— One P., Sealed and said to contain one hundred and fifty dolls. Addressed, Patrick Corbett, Taunton, Mass.

"Upon the special acceptance and agreement that this company is to forward the same to its agent nearest or most convenient to destination only, and there to deliver the same to other parties to complete the transportation, — such delivery to terminate all liability of this company for such package; and also, that this company is not to be liable in any manner or to any extent for any loss, damage, or detention of such package, or of its contents, or of any portion thereof, . . . occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or steam. For the Company. Robinson."

Colt, J. It is to be received as now settled by the current and weight of authority, that a common carrier may, by special contract, avoid or limit his liability at common law as an insurer of property intrusted to him against loss or damage by fire, occurring without fault on his part. It is not necessary to discuss here, how far in this or other respects he may escape those liabilities which the policy of the law imposes by mere notices brought home to the employer, or whether the effect of such notices may not be held to vary according as it is attempted to avoid those extraordinary responsibilities which are peculiar to common carriers, or those other liabilities under which they are held in common with all other bailees for hire. Judson *v.* Western Railroad Co., 6 Allen, 486 [**185**]; York Co. *v.* Central Railroad Co., 3 Wallace, 107; Hooper *v.* Wells, 27 Calif. 11; and see article by Redfield, with collection of authorities, 5 Am. Law Reg. N. S. 1.

It is claimed here that the shipping receipt or bill of lading constituted a valid and binding contract between the parties, and that, upon the loss at sea of the plaintiff's package in the course of its transportation under the contract, by an accidental fire, the defendants were discharged from any obligation to the plaintiff in regard to it; and the court are of opinion that this claim must be sustained.

The receipt was delivered to the plaintiff as the contract of the defendants; it is in proper form; and the terms and conditions are expressed in the body of it in a way not calculated to escape attention. The acceptance of it by the plaintiff, at the time of the delivery of his package, without notice of his dissent from its terms, authorized the defendants to infer assent by the plaintiff. It was his only voucher and evidence against the defendants. It is not claimed that he did not know, when he took it, that it was a shipping contract or bill of lading. It was his duty to read it. The law presumes, in the absence of fraud or imposition, that he did read it, or was otherwise informed of its contents, and was willing to assent to its terms without reading it. Any other rule would fail to conform to the experience of all men. Written contracts are intended to preserve the exact terms of the obligations assumed, so that they may not be subject to the chances of a want of recollection or an intentional misstatement. The defendants have a right to this

protection and are not to be deprived of it by the wilful or negligent omission of the plaintiff to read the paper. The case of Rice *v.* Dwight Manufacturing Co., 2 Cush. 80, 87, is an authority in point. In an action to recover for work done, the defence was that the work was performed under a special contract, and a paper of printed regulations was shown to have been given to and accepted by the plaintiff as containing the terms of the contract, but which was not signed by either party. The plaintiff denied knowledge of its contents; but it was said by Forbes, J., that where a party enters into a written contract, in the absence of fraud, he is conclusively presumed to understand the terms and legal effect of it, and to consent to them. See also Lewis *v.* Great Western Railway Co., 5 H. & N. 867; Squire *v.* New York Central Railroad Co., 98 Mass. 239.

This case, then, is brought within the rule which authorizes carriers to relieve themselves from losses of this description by express contracts with the employer. It differs from the cases of Brown *v.* Eastern Railroad Co., 11 Cush. 97, and Malone *v.* Boston & Worcester Railroad Co., 12 Gray, 388. The limitation relied on in both those cases was in the form of a notice printed on the back of a passenger ticket, relating to baggage; and it was held that there was no presumption of law that the party, at the time of receiving the ticket, had knowledge of the contents of the notice. It is obvious that in those cases the ticket was not designed to be held as the evidence of the contract between the parties. The contract, which was of passenger transportation, was not attempted to be set forth. At most, it was but a check, to be used temporarily and then delivered to the conductor as his voucher, with these notices on the back. The presumption that every man knows the terms of a written contract which he enters into, therefore, did not apply. Nor was the acceptance of the ticket conclusive evidence of assent to its terms.

The recent case of Buckland *v.* Adams Express Co., 97 Mass. 124, requires notice, because, upon a case in most respects similar to this, a different result was reached by the court.[1] The legal prin-

[1] [The following paragraph from the opinion in the case cited shows the view of the court on this point. The other portion of the case is found on page 30 of this volume.]

The other question raised by the agreed facts is rather one of fact than of law. It is no longer open to controversy in this State that a common carrier may limit his responsibility for property intrusted to him by a notice containing reasonable and suitable restrictions, if brought home to the owner of goods delivered for transportation and assented to clearly and unequivocally by him. It is also settled that assent is not necessarily to be inferred from the mere fact that knowledge of such notice on the part of an owner or consignor of goods is shown. The evidence must go further and be sufficient to show that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties according to which the service of the carrier was to be rendered. Judson *v.* Western Railroad Co., 6 Allen, 486–490 [185]. On a consideration of the facts stated, it does not appear to us that the plaintiffs ever did agree that the merchandise in question should be transported on the terms set forth in the receipt which was delivered to the workman at the manu-

ciples upon which that case was decided are those here stated. It was a case upon an agreed statement of facts; and the difference resulted in the application of the law to the facts then presented. It is to be noticed that the receipt containing the limitation relied on was in that case delivered to a workman in the employ of a stranger, who, so far as it appears, had, in that particular instance only, been requested by the plaintiffs to deliver the parcel in their absence, and as a mere favor to them. And it further appeared that the previous course of dealing between the parties was such that, in a majority of instances, in which the plaintiffs had employed the defendants to transport like packages, no receipt was made out, and no special contract insisted upon. Under such circumstances, it was held that it could not fairly be inferred that the plaintiffs understood and assented to the contents of the receipt as fixing the terms on which the defendants were to transport the merchandise, or that the workman had authority to make an unusual contract.

The same remarks apply to the case of Perry *v.* Thompson, 98 Mass. 249, which is to be distinguished from the case at bar by the fact that, in the previous dealings of the parties, property had been received and carried without any notice relating to the carrier's liability having been given, and by the further fact that, when the notice in that instance was received, the printed parts of it were so covered up by the revenue stamp affixed to the receipt that it could not be read intelligibly.

So in Fillebrown *v.* Grand Trunk Railway Co., 55 Maine, 462, it was held that, when a verbal contract for transportation was made without restriction, its legal effect would not be changed by the conditions in a receipt which was subsequently given to the clerk of the consignor, who delivered the goods at the station, but who had no express authority either to deliver or to contract with the defendants.

These cases do not reach the case at bar, where the delivery of the receipt was directly to the plaintiff; nor would they be held decisive in a case where the delivery was made and the receipt accepted under ordinary circumstances by a special or general agent

factory when the package was delivered to the defendant's agent. It is not stated that the plaintiffs or either of them ever read the paper containing the alleged regulations or one similar to it. It is agreed that defendants received and carried like packages of merchandise for the plaintiffs at or about the time when the one in controversy was delivered for carriage without giving the plaintiffs any receipt whatever therefor, and this was the course of dealing between the parties in a large majority of the instances in which the defendants had been employed by the plaintiffs. From this it would appear that the ordinary course of business was for the defendants to receive merchandise from the plaintiffs without attempting to limit their liability as carriers in any manner whatever. Under such circumstances we cannot fairly infer that the plaintiffs understood that by the delivery of a receipt for the merchandise the defendants intended to limit the liability which they ordinarily assumed in their dealings with the plaintiffs, or that the latter understood and assented to the contents of such receipt as fixing the terms on which the defendants were to transport the merchandise.

of the owner, not a mere servant or porter, and who might be regarded as clothed with authority to bind the owner in giving instructions and making conditions affecting the transportation. Squire v. New York Central Railroad Co., 98 Mass. 239.

Judgment for the defendants.[1]

SHELTON *v.* MERCHANTS' DISPATCH, ETC. CO.

59 N. Y. 258. 1874.

APPEAL from judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of plaintiff, entered upon the report of a referee.

This action was against defendant as a common carrier, for failure to deliver goods intrusted to it for transportation.

The referee found the following facts: —

That on the 26 day of October, 1871, the plaintiff purchased at the city of New York, of the firm of H. B. Claflin & Co., a quantity of goods, and directed them to ship the same to him at Janesville, Wisconsin, by the defendant's line. The goods so purchased were packed by Claflin & Co., were by them marked "H. S. Shelton, Janesville, Wis.," and were, on the same day, by them delivered to the defendant, at its depot in the city. At the time of such delivery, H. B. Claflin & Co. received from the defendant three receipts. (A copy of one is contained in opinion.) On the third

[1] ANCHOR LINE *v.* DATER.

68 Ill. 369. 1873.

BREESE, Ch. J. . . . . .

The bill of lading delivered to the consignors relieves the carrier from liability for loss by fire, while the property is in transit or while in depots, etc.

This bill of lading, appellants insist, was the contract of the parties, by which they are bound, and the provisions of which are plainly and easily understood by any business man, and the assent of the shipper to the terms contained in it should be presumed.

The court, sitting as a jury, did not find evidence sufficient to justify it in presuming assent from the mere acceptance of the receipt. The shipper had no alternative but an acceptance of it, and his assent to its conditions cannot be inferred from that fact alone. It is in proof that its terms and conditions were not known to these shippers, although they had accepted a large number of them in the course of their business with the appellants.

The terms and conditions of this bill of lading, or receipt, were inserted for the purpose of limiting the liability appellants were under by the common law. They should appear plainly in the instrument, be understood by the consignor, and knowingly accepted as the contract of the parties, and intended to evidence the terms of the contract. These were points for the court trying the case, and the finding of the court in this respect cannot be disturbed. . . . . .

and fourth days of October, Claflin & Co. presented the receipts at the general office of the defendant, and on the same or following day received bills of lading in the usual and customary form given by defendant. They contained this clause: —

"To be forwarded in like good order (dangers of navigation, collisions, and fire, and loss occasioned by mob, riot, insurrection, or rebellion, and all dangers incident to railroad transportation, excepted) to Chicago depot only, he or they paying freight and charges for the same as below."

It was the usual custom of said H. B. Claflin & Co. to mail receipts or bills of lading to their consignees.

The packages aforesaid were safely and with all due care and diligence transported to Chicago, and arrived there, a part in the evening of Saturday, the seventh day of October, and the remainder thereof on the morning of Sunday, the eighth day of October, and were, upon their arrival, unloaded into a freight-house used by the defendants. In the evening of the eighth, a great fire occurred in Chicago, without fault or negligence on the part of the defendant; that said packages and their contents were consumed and entirely destroyed, without negligence of any kind on the part of the defendant.

The referee was requested to find the following additional facts, which appeared by the evidence: —

"That the said A. B. Claflin & Co. were, on the said 2d day of October, 1871, and for a long time previous thereto had been, large shippers of goods by the defendant's line, and that it had always been their custom to obtain receipts or bills of lading therefor."

" That the defendants were, at the time mentioned in the complaint, carriers of goods, wares, and merchandise for him between different parts of the United States, but that, in October, 1871, the terminus of the route of defendant from the city of New York in the direction of Janesville, Wisconsin, was, and had been since the 10th day of March, 1871, Chicago, Illinois, and that transportation beyond Chicago, in the direction of and to Janesville aforesaid, had to be performed by separate and independent carriers, and the charges of transportation beyond Chicago were paid to such carriers by the owners of the property transported in addition to the amount paid to defendant for transportation to Chicago aforesaid."

The referee refused so to find, as immaterial, and defendant's counsel excepted.

Johnson, J. The referee refused to find that, previous to the shipment in question, H. B. Claflin & Co. had been large shippers by the defendant's line, and had been always accustomed to obtain bills of lading for the goods shipped; and also that the defendants were carriers upon a route terminating at Chicago, and not extending to Janesville, Wisconsin; and that between the latter points transportation had to be performed by separate and independent

carriers. These matters the referee refused to find, on the ground that they were immaterial to the rights of the parties. In this we think he erred, and for the following reasons: Claflin & Co. were the agents of the plaintiff in respect to the transportation of the goods in question. His directions to them were to ship the goods to him at Janesville, Wisconsin, by the defendant's line. The extent of the authority thus conferred, was considered in Nelson *v.* Hudson River Railroad Company, 48 N. Y. 498. It necessarily extends to the making of such contracts as the agents, in the honest exercise of their discretion, see fit to make. The fact that the carriers and the agents employed have a habitual course of dealing in respect to contracts for transportation, is a material and important element in determining the construction to be put on their acts in any particular case. Mills *v.* Mich. Cent. Railroad, 45 N. Y. 622. The delivery by the agents of the plaintiff, to the carriers, was made upon no particular agreement made at the time. The packages were marked with the address of the plaintiff, and receipts were signed by the agents of the defendants, at their receiving depot at New York. These receipts were in a bound receipt-book belonging to Claflin & Co., filled up by them, and signed by the agents of the defendants. They purport to be receipts, and not contracts for carriage. They were in the following form: "New York, Oct. 2, 1871. Received from H. B. Claflin & Co., in good order on board the M. D. for —— the following packages, one case D. G. marked H. S. Shelton, Janesville, Wis.," and were signed "Gleason." In a day or two, but after the packages had been started on their way, the agents of the plaintiff, acting in accordance with the habitual mode of doing this business, sent the receipts to the defendant's office, and procured bills of lading for the goods, the giving of which was entered on the several receipts. These bills of lading expressed the actual contract of carriage between the parties who in fact made the contract, the defendants on the one hand, and H. B. Claflin on the other. When the goods were delivered and the primary receipts given, each of the parties was acting in a habitual method, and with a habitual understanding of what they were engaged in doing. The receipts were presented and signed with the view and expectation on both sides that bills of lading were in the usual course to be subsequently issued, expressing the intentions and engagements of the parties. This was their method of dealing, distinctly in their contemplation from the beginning, reasonable in itself and completely within the authority committed by the plaintiffs to his agents, H. B. Claflin & Co. Any attempt on their part to claim a different agreement would have been an act of bad faith; because it would have been a departure from the understanding based upon the previous course of dealing of these parties. In the view we take of the relations and acts of those parties, the matters of fact which the referee held to be immaterial were plainly mate-

rial, because they were essential to the disclosure of the actual contract of the parties. The bills of lading were obtained by the plaintiff's agents, in the exercise of their original authority to contract with the defendants for transportation, and these controlled the rights of the parties and displaced the common-law relation, which otherwise might have existed between them.

The order of time in which the business was actually transacted cannot be allowed to affect the rights of the parties. If H. B. Claflin & Co. were originally authorized to ship on bills of lading limiting the common-law liability of the defendants, the fact that receipts were taken in one stage of the business, intended by neither party as completing their dealing or contract, did not exhaust the authority. It was never so intended and cannot have that effect. The acts of the parties must have operation as they were intended by the parties when they were done. The bills of lading excepted the risk of fire, and as it was by that danger that the property in question was destroyed, the defendants are free from liability, at least unless the loss was due to their negligence or fault. The only suggestion of fault is that the cars containing these packages were unloaded on Sunday in Chicago. The case does not inform us that by the law of Illinois, where the loss happened, unloading cars on Sunday was unlawful, and we have no means of knowing such to be the fact, in respect to the laws of that State. The common law, at least, teaches no such doctrine.

The judgment should be reversed and a new trial ordered, costs to abide the event.

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f. *Available to Connecting Carrier.*

BABCOCK *v.* LAKE SHORE, ETC. R. CO.

49 N. Y. 491. 1872.

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, affirming a judgment for the defendant entered on decision of the court upon trial without a jury. Rep. below, 43 How. Pr. R. 317.

The action was brought to recover the value of a quantity of petroleum oil destroyed by fire while in possession of defendant as common carrier.

On November 14, 1867, the plaintiff shipped fifty-six barrels of refined petroleum, at Oil City, in the State of Pennsylvania, by the Atlantic and Great Western Railway Company, under an agreement, of which the following is a copy: —

"Atlantic and Great Western Railway, 7.35.

"Oil City Station, November 14, 1867.

"Received from Babcock for shipment by The Atlantic and Great Western Railway Company, the following property in good order, except as noted, marked, and consigned as follows: —

Mark.	Article.
J. W. O. & Co. J. W. Osburn & Co. Albany, N. Y. {5 Cent Internal Revenue Stamp, cancelled.}	56 Bbls. R. Oil, Car 1,848.

"Rate in cents per 100 lbs. $25.00 per car.

"Which this company and connecting roads agree to deliver with as reasonable despatch as their general business will permit, delays and accidents excepted, but they do not agree to transport the same by any particular train, nor in any specified time."

"Subject to the conditions below:

"At Corry station upon payment of freight and charges thereon.

"In consideration of the reduced rate given and specified above for the transportation of petroleum, it is understood that the owner or shipper assumes all risk of damage from fire or leakage or from any cause whatever while in transit, or at the depots or stations of any of the companies whose lines of road it may be transported upon or over.

"The rates on petroleum, when taken at the companies' risk, or damage from fire or other causes, being double the amount herein specified. 'The owner or shipper of this property, in consideration of having the same transported at such reduced rates, does hereby release this and all other companies over whose lines of roads it may pass, from all claim for loss or damage by fire, leakage, or any other cause whatever, such products of petroleum as naphtha, benzine, benzole, etc., etc., being exceedingly hazardous, will not be transported except by special agreement as to time of receiving and rates to be charged; and any party shipping such articles, without notifying the company and getting their consent, shall not only forfeit all claim against the company for damages sustained, but shall be accountable to the company for loss it may sustain in consequence thereof.

"'The acceptance of this receipt by the owner or shipper will be considered as evidence of his assent to all the conditions contained therein.'

"D. W. Gurnsey, Jr., *Agent.*"

The price stated in the contract was the customary price for the transportation of freight from Oil City to Corry.

That company carried the petroleum to Corry, and there delivered it to The Buffalo and Pittsburg Railroad Company, which company

carried it to Brocton, in this State, and delivered it to the Buffalo and Erie Railroad Company, of which company defendant is successor and liable for its debts and obligations. While in possession of the Buffalo and Erie Railroad Company, the oil was destroyed by fire.

Allen, J. To exempt the defendant, the successor in liability to the Buffalo and Erie Railroad Company, from the common-law responsibility of common carriers, extending to all losses except those resulting from the act of God or the public enemies, it must appear that the oil of the plaintiff was, at the time of its destruction, in the possession of the Buffalo and Erie Railroad Company, for transportation under a special contract, restricting the liability of the carrier, made by and with the plaintiff, or some one authorized to act in his behalf. The contract with the Atlantic and Great Western Railway Company was special in its terms, and by it the liabilities of the carrier were greatly restricted, and a loss by fire was excepted from the risk of the carrier, and if that was a through contract, — that is, a contract for the carriage of the property to and a delivery of it at Albany, its ultimate destination, — each carrier in the course of its transit, including the Buffalo and Erie Railroad Company, was entitled to the benefit of the exemptions from liability secured by it. It would be regarded as made for the benefit of all who undertake the carriage of the goods upon the terms and conditions prescribed by it.

If it was not a through contract, then the Buffalo and Erie Railroad Company received the goods as common carriers, and are liable as such for all losses not within the recognized exceptions; that is, except those which were inevitable or occasioned by public enemies.

If the first carrier, the Atlantic and Great Western Railway Company, only undertook for the carriage of the oil to Corry for an agreed compensation, and the delivery at that place to another carrier, there was no authority resulting from the relation, or the contract between that company and the plaintiff, to enter into a special contract, in behalf of the plaintiff, with the next carrier at Corry, to limit and restrict the liability of such carrier in any respect. There was no agency created; the whole duty of the Atlantic and Great Western Railway Company was that of carrier, and terminated with the delivery of the goods to the next carrier, and the common-law liability of the carrier receiving the goods attached at once and by necessary implication upon their receipt.

The goods were received by the Atlantic and Great Western Railway Company at Oil City, in Pennsylvania, addressed to J. W. O. & Co., Albany, New York, and, had they been received without special contract, a contract would not have been implied on the part of the railway company to carry the goods or provide for their carriage beyond the terminus of its road. Its whole duty would have been

performed by transporting them to the extent of its own route and delivering them to the next connecting carrier; that is, the railway company would have been liable as a carrier over its own road and as a forwarder from the terminus of its line. This is the recognized rule in this and other States, although it is otherwise in England. Root v. Great Western Railway Co., 45 N. Y. 524, and cases cited by Rapallo, J., Redfield on Carriers, § 181, and cases cited in note 9. But the goods were received by the Atlantic and Great Western Railway Company under special contract, and upon the interpretation of that contract and the effect to be given to it the decision of this case hinges. In the agreement the goods were described as "56 bbls. R. Oil, Car 1,848," and in the margin "mark, J. W. O. & Co., J. W. Osborne & Co., Albany, N. Y." The mark or direction of the property was given to identify and distinguish it from other property of the same character, and was not inserted as a part of the agreement, and from it a contract to carry to Albany would not be implied. The agreement was by "this (The A. & G. W. R.) company and connecting roads," to deliver the property at Corry station, which was the terminus of the road of that company, upon payment of freight and charges thereon. The freight was specified at twenty-five dollars per car. This was the freight to Corry, and no rate was agreed upon or specified for transportation beyond that place. By the agreement the plaintiff, "in consideration of the reduced rates given and specified above for the transportation of petroleum," assumed certain risks, including that by which the property was destroyed, "while in transit, or the depots or station of any of the companies whose lines of road it may be transported upon or over."

The plaintiff did, "in consideration of having the petroleum transported at such reduced rates," release the A. & G. W. R. Co. and all other companies over whose lines of roads it may pass, from "all claim from loss or damage by fire," etc. The agreement was made by filling up a printed form adapted to a contract for the transportation of goods beyond the route of the contracting carrier, and over the lines of other and connecting roads to distant places. The parties merely inserted in writing the date and place of shipment, the name of the owner, the description of the property, the freight and the place of delivery (Corry station). The commencement and termination of the responsibility of the carrier (The A. & G. W. R. Co.) were expressed clearly and distinctly in the written parts of the contract.

The goods were not lost or destroyed between the place of their receipt and Corry, nor until after they had left Corry in charge of other carriers and had come into the possession of the Buffalo and Erie Railway Company, in the course of their transit to Albany. The contract was for the carriage of the oil to Corry, and only so much of the printed matter of the blank form used as is consistent

with and appropriate to that contract is of any effect. The intent of the contracting parties is to be gathered from the entire instrument, the written part controlling where that and the printed are in conflict, and the latter to be rejected when incompatible with or inappropriate to the intent of the parties, as clearly indicated by the written portion. The printed form is very general, and contains provisions adapted to contracts differing essentially from this, some of which are not adapted to a contract for the carriage of goods wholly within the limits of the contracting carriers' line of road, and such parts as are inapplicable must be rejected as surplusage, and the written portion of the agreement prevail. Leeds *v.* Mechanics' Ins. Co., 4 Seld. 351; Harper *v.* Albany Mutual Ins. Co., 17 N. Y. 194. The limitation of the carrier's liability by the contract is necessarily confined to the service contracted for, and the carriers who were parties to it.

Carriers who are not named in a contract for the carriage of goods, and who are not formal parties to it, may, under certain circumstances, have the benefit of it. Such is the case when a contract is made by one of several carriers upon connecting lines or routes for the carriage of property over the several routes for an agreed price by authority, express or implied, of all the carriers. So, too, in the absence of any authority in advance, or any usage from which an authority might be inferred, a contract by one carrier for the transportation of goods over his own and connecting lines, adopted and acted upon by the other carriers, would enure to the benefit of all thus ratifying it, and performing service under it. But in such and the like cases the contract has respect to and provides for the services of the carriers upon the connecting routes. Maghee *v.* The Camden & Amboy R. Trans. Co., 45 N. Y. 514, and Lamb *v.* Same, 46 N. Y. 272, are in point, and illustrate the rule.

There was no agreement here for the carriage of the oil beyond Corry, no rate of freight agreed upon to any other point, and the carrier was entitled to receive the freight earned, twenty-five dollars per car, on delivery of the oil at that place. There was no consideration for an agreement by the plaintiff to relieve the carriers who should thereafter receive the property for transportation from the common-law liabilities, and no such an agreement was made. It is claimed that the finding of the judge by whom the cause was tried, that the Buffalo and Erie Railroad Company received the property, "under and in pursuance of said agreement, upon its said railroad from Brocton to Buffalo," is conclusive as a finding of fact, and entitles the defendant absolutely to the benefit of the stipulations of that contract. The answer is that the transportation from Brocton to Buffalo is not within the limits of the contract, and it was simply impossible that goods could be carried between those places in pursuance of a contract expressly providing for an entirely different transportation, or a transportation between two other places on a

different route. While twenty-five dollars per car freight might have been a reasonable or a reduced rate for transportation from Oil City to Corry, it may have been an entirely inadequate or an exorbitant rate for transporting the same property from Corry to Brocton, from Brocton to Buffalo, or Buffalo to Albany. It is certainly improbable that the same freight was to be the compensation to each of the railroad companies by whom the oil should be carried in its transit to Albany.

The contract was not intended as a through contract. The plaintiff has no claim under it either against the Atlantic and Great Western Railway Company or any of the connecting roads for the carriage of the goods beyond Corry, and it necessarily follows that its stipulations did not extend to or affect the carriage beyond that place.

The Camden and Amboy R. & T. Co. were held liable as common carriers under a contract somewhat like this, made with the Pennsylvania Railroad Company, under which the goods were transported by the latter company to Philadelphia and there delivered to the former company. C. & A. R. & T. Co. *v.* Forsythe, 61 Penn. R. 81.

Bristol & Exeter Railway Co. *v.* Cummings, 5 H. and N. 969, merely held, carrying out the doctrine of Muschamp *v.* The Lancaster & Preston Junction Railway Co., 8 M. and W. 421, which has not been followed in this State, that the contract of carriage in that case was a through contract made by the Great Western Railway Co. for the carriage of the goods to their ultimate destination, and that the contracting carrier was solely liable for the loss of the goods in transit, although they were lost while in course of transportation by the defendant who received them from the first carrier at the terminus of its road for transportation to the place to which they were directed. This case would not be followed with us, but each carrier would be held responsible for a loss or damage to the goods while in his custody, and the only question would be as to the extent of his liability, and whether he was entitled to the benefit of any stipulations in the contract made with the first carrier.

The defendant, upon the case made and facts found by the judge at the trial, was subject to all the common-law liabilities of carriers, and the stipulations of the contract with the Atlantic and G. W. R. Co. did not extend to the transportation of the goods by the defendant. It is not necessary to consider at this time the liability of the parties, in case it should appear that the oil was being carried at a reduced rate of freight.

Judgment must be reversed and a new trial granted.[1]

[1] KIFF *v.* ATCHISON, TOPEKA & SANTA FE R. CO.

32 Kan. 263. 1884.

Horton, J. . . . . .

The evidence shows that on April 28th, 1880, the Cleveland Cooperative Stove

6. THE BILL OF LADING.

a. *As a Contract.*

THE DELAWARE.

14 Wall. (U. S.) 579. 1871.

Appeal from the Circuit Court of the District of California, the case being thus: —

The Oregon Iron Company, on the 8th day of May, 1868, shipped on board the bark "Delaware," then at Portland, Oregon, 76 tons of pig-iron, to be carried to San Francisco, at a freight of $4.50 a ton. The bill of lading was in these words: —

"Shipped, in good order and condition, by Oregon Iron Company, on board the good bark 'Delaware,' Shillaber, master, now lying in the port of Portland, and bound to San Francisco, to say seventy-five tons pig-iron, more

---

Company, of St. Louis, delivered to the Missouri Pacific Railway Company, in St. Louis, the stoves in question, to be by it transported to Hutchinson, Kansas, and there delivered to plaintiff. The railroad company, on delivery of the stoves, delivered to the shippers a duplicate receipt, of which the following is a copy: —

"St. Louis, April 28th, 1883.

"Received from the Cleveland Co-operative Stove Company, St. Louis Branch, 2900 Eleventh Street, by Mo. Pac. R. R., the following property, to be delivered in like good order, as addressed, without delay, at consignor's risk:

FOR G. B. KIFF, ESQ., HUTCHINSON, KANSAS.

Articles.	*Marks.*
3 cooking stoves. 3 stove sections, weight 690, *W.*	K.

Owner's risk.

"This duplicate dray ticket is sent you as a memorandum by which to check off goods. If the stoves, bundles, pieces, etc., do not agree with this, or the freight bill is overcharged, please return to us your freight bill at once, with this, noting thereon the charges, and we will attend to the matter with pleasure promptly."

This receipt is the only contract for transportation of the stoves shown by the evidence, and under it they were transported, and on their arrival in Hutchinson were found to be broken and damaged. The evidence shows that the stoves were carried by the Missouri Pacific Railway Company over a portion of its line and delivered to the San Francisco Railroad Company, which carried them to Emporia, and there delivered them to defendant, which carried them to Hutchinson. Each of these connecting lines of transportation is entitled to the benefit of the special contract between the shippers and the Missouri Pacific Railway Company, and either of them, when sued, may claim the exemption of the contract. Whitworth *et al.* *v.* Erie Railway Co., 87 N. Y. 414.

. . . . . .

or less (contents, quality, and weight unknown), being marked as in the margin, and are to be delivered in like good order and condition at the aforesaid port of San Francisco, at ship's tackles (the dangers of the seas, fire, and collision excepted) unto ———, or assigns, he or they paying freight for the said goods in United States gold coin (before delivery, if required) as per margin, with 5 per cent. primage and average accustomed.

"In witness whereof the master or agent of said vessel hath affirmed to three bills of lading, all of this tenor and date; one of which being accomplished, the others to stand void. Vessel not accountable for breakage, leakage, or rust.

"C. E. Shillaber,
"Portland, May 8th, 1868. For the Captain."

The iron was not delivered at San Francisco; and on a libel filed by the Iron Company, the defence set up was that by a verbal agreement made between the Iron Company and the master of the ship before the shipment or the signing of the bill of lading, the iron was stowed on deck, and that the whole of it, with the exception of 6 tons and 90 lbs., had been jettisoned in a storm.

On the trial, the owners of the vessel offered proof of this parol agreement. The libellants objected, and the court excluded the evidence on the ground that parol proof was inadmissible to vary the bill of lading; and decreed in favor of the libellants for the iron that was thrown overboard. On appeal the case was disposed of in the same way in the Circuit Court. It was now here; the question being, as in the two courts below, whether in a suit upon a bill of lading like the one here, for non-delivery of goods stowed on deck, and jettisoned at sea, it is competent, in the absence of a custom to stow such goods on deck, to prove by parol a verbal agreement for such stowage.

Mr. Justice Clifford. . . . . .

Seventy-five tons of pig-iron were shipped by the libellants, on the 8th day of May, 1868, on board the bark "Delaware," then lying in the port of Portland, Oregon, to be transported from that port to the port of San Francisco, for the freight of four dollars and fifty cents per ton, to be delivered to the shippers or their assigns at the port of destination, they paying freight as therein stipulated, before delivery if required, with five per cent primage and average accustomed. Dangers of the seas, fire, and collision were excepted in the bill of lading, and the statement at the close of the instrument was, "vessel not accountable for breakage, leakage, or rust."

Process was served, and the claimant appeared and filed an answer in which he admits the shipment of the iron and the execution of the bill of lading exhibited in the record. Sufficient also appears in the record to show that the voyage was performed and that but a small portion of the iron shipped — to wit, some thirteen or fourteen hundred pounds — was ever delivered to the consignees, and that all the residue of the shipment was thrown overboard as a jettison

during the voyage, which became necessary by a peril of the sea, for the safety of the other associate interests and for the preservation of the lives of those on board. Sacrificed as all that portion of the shipment was as a jettison in consequence of a peril of the sea, excepted in the bill of lading, the claimant insists that the libellants have no claim against the ship, and that the libellants as the shippers of the iron must bear their own loss.

Evidence was exhibited by the claimant sufficient to show that the allegations of the answer that the iron, not delivered, was sacrificed during the voyage as a jettison in consequence of a peril of the sea, are true, but the libellants allege that the iron was improperly stowed upon the deck of the vessel, and that the necessity of sacrificing it as a jettison arose solely from that fact, and that no such a necessity would have arisen if it had been properly stowed under deck, as it should have been by the terms of the contract specified in the bill of lading. That the iron not delivered was stowed on deck is admitted, and it is also conceded that where goods are stowed in that way without the consent of the shipper the carrier is liable in all events if the goods are not delivered, unless he can show that the goods were of that description, which, by the usage of the particular trade, are properly stowed in that way, or that the delivery was prevented by the act of God or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier and expressly excepted in the bill of lading.

Goods, though lost by perils of the sea, if they were stowed on deck without the consent of the shipper, are not regarded as goods lost by the act of God within the meaning of the maritime law, nor are such losses regarded as losses by perils of the sea which will excuse the carrier from delivering the goods shipped to the consignee unless it appears that the manner in which the goods were stowed is sanctioned by commercial usage, or unless it affirmatively appears that the manner of stowage did not, in any degree, contribute to the disaster; that the loss happened without any fault or negligence on the part of the carrier, and that it could not have been prevented by human skill and prudence, even if the goods had been stowed under deck, as required by the general rules of the maritime law.[1]

Enough appears in the record to show that all the iron not delivered to the consignees was stowed on deck, and there is no proof in the case to show that the usage of the trade sanctioned such a stowage in this case, or that the manner in which it was stowed did not contribute both to the disaster and to the loss of the goods.[2]

None of these principles are controverted by the claimant, but he insists that the iron not delivered was stowed on deck by the consent of the shippers and in pursuance of an oral agreement between the

[1] Lawrence *et al. v.* Minturn, 17 Howard, 114; The Peytona, 2 Curtis, 23.

[2] Gould *v.* Oliver, 4 Bingham's New Cases, 142; Story on Bailment, § 531.

carrier and the shippers consummated before the iron was sent on board, and before the bill of lading was executed by the master. Pursuant to that theory, testimony was offered in the District Court showing that certain conversations took place between the consignee of the bark and the agent of the shippers tending to prove that the shippers consented that the iron in question should be stowed on the deck of the vessel. Whether any express exceptions to the admissibility of the evidence was taken or not does not distinctly appear, but it does appear that the question whether the evidence was or not admissible was the principal question examined by the District Court, and the one upon which the decision in the case chiefly turned. Apparently it was also the main point examined in the Circuit Court, and it is certain that it has been treated by both sides in this court as the principal issue involved in the record, and in view of all the circumstances the court here decides that it must be considered that the question as to the admissibility of the evidence is now open for revision, as the decree for the libellant was equivalent to a ruling rejecting the evidence offered in defence or to a ruling granting a motion to strike it out after it had been admitted, which is a course often pursued by courts in cases where the question deserves examination. What the claimant offered to prove was that the iron was stowed on deck with the consent of the shippers, but the libellants objected to the evidence as repugnant to the contract set forth in the bill of lading, and the decree was for the libellants, which was equivalent to a decision that the evidence offered was incompetent. Dissatisfied with that decree, the respondent appealed to the Circuit Court, where the decree of the District Court was affirmed, and the same party appealed from that decree and removed the cause into this court for re-examination.

Even without any further explanation it is obvious that the only question of any importance in the case is whether the evidence offered to show that the iron in question was stowed on deck with the consent of the shippers was or was not properly rejected, as it is clear if it was, that the decree must be affirmed; and it is equally clear, if it should have been admitted, that the decree must be reversed.[1]

Different definitions to the commercial instrument, called the bill of lading, have been given by different courts and jurists, but the correct one appears to be that it is a written acknowledgment, signed by the master, that he has received the goods therein described from the shipper, to be transported on the terms therein expressed, to the described place of destination, and there to be delivered to the consignee or parties therein designated.[2] Regularly the goods

[1] Angell on Carriers, § 312; Redfield on Carriers, §§ 247 to 269; The St. Cloud, Brown & Lushington's Adm'r. 4.

[2] Abbott on Shipping, 7th Am. ed. 322; O'Brien v. Gilchrist, 34 Maine, 558 [247]; 1 Parsons on Shipping, 196; Maclachlan on Shipping, 218; Emerigon on Ins. 251.

ought to be on board before the bill of lading is signed; but if the bill of lading, through inadvertence or otherwise, is signed before the goods are actually shipped, as if they are received on the wharf or sent to the warehouse of the carrier, or are delivered into the custody of the master or other agent of the owner or charterer of the vessel, and are afterwards placed on board, as and for the goods embraced in the bill of lading, it is clear that the bill of lading will operate on those goods as between the shipper and the carrier by way of relation and estoppel, and that the rights and obligations of all concerned are the same as if the goods had been actually shipped before the bill of lading had been signed.[1] Such an instrument is twofold in its character; that is, it is a receipt as to the quantity and description of the goods shipped, and a contract to transport and deliver the goods to the consignee or other person therein designated, and upon the terms specified in the same instrument.[2] Beyond all doubt a bill of lading, in the usual form, is a receipt for the quantity of goods shipped and a promise to transport and deliver the same as therein stipulated.[3] Receipts may be either a mere acknowledgment of payment or delivery, or they may also contain a contract to do something in relation to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge the payment or delivery, it, the receipt, is merely *prima facie* evidence of the fact, and not conclusive, and therefore the fact which it recites may be contradicted by oral testimony, but in so far as it is evidence of a contract between the parties it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol evidence.[4] Text-writers mention the bill of lading as an example of an instrument which partakes of a twofold character, and such commentators agree that the instrument may, as between carrier and shipper, be contradicted and explained in its recital that the goods were in good order and well conditioned, by showing that their internal state and condition was bad, or not such as is represented in the instrument, and in like manner, in respect to any other fact which it erroneously recites, but in all other respects it is to be treated like other written contracts.[5]

Bills of lading when signed by the master, duly executed in the usual course of business, bind the owners of the vessel if the goods were laden on board or were actually delivered into the custody of

[1] Rowley *v.* Bigelow, 12 Pickering, 307; The Eddy, 5 Wallace, 495.

[2] Maclachlan on Shipping, 338–9; Smith's Mercantile Law, 6th ed. 308.

[3] Bates *v.* Todd, 1 Moody & Robinson, 106; Berkley *v.* Watling, 7 Adolphus & Ellis, 29; Wayland *v.* Mosely, 5 Alabama, 430; Brown *v.* Byrne, 3 Ellis & Blackburne, 714; Blaikie *v.* Stembridge, 6 C. B. N. S. 907.

[4] 1 Greenleaf on Evidence, 12th ed. § 305; Bradley *v.* Dunipace, 1 Hurlstone & Colt, 525.

[5] Hastings *v.* Pepper, 11 Pickering, 42; Clark *v.* Barnwell *et al.*, 12 Howard, 272; Ellis *v.* Willard, 5 Selden, 529; May *v.* Babcock, 4 Ohio, 346; Adams *v.* Packet Co., 5 C. B. N. S. 492; Sack *v.* Ford, 13 C. B. N. S. 100.

the master; but it is well-settled law that the owners are not liable if the party to whom the bill of lading was given had no goods, or the goods described in the bill of lading were never put on board or delivered into the custody of the carrier or his agent.[1] Proof of fraud is certainly a good defence to an action claiming damages for the non-delivery of the goods; but it is settled law in this court that a clean bill of lading imports that the goods are to be safely and properly stowed under deck, and that it is the duty of the master to see that the cargo is so stowed and arranged that the different goods may not be injured by each other or by the motion or leakage of the vessel, unless by agreement that service is to be performed by the shipper.[2] Express contracts may be made in writing which will define the obligations and duties of the parties, but where those obligations and duties are evidenced by a clean bill of lading,—that is, if the bill of lading is silent as to the mode of stowing the goods, and it contains no exceptions as to the liability of the master, except the usual one of the dangers of the sea,—the law provides that the goods are to be carried under deck, unless it be shown that the usage of the particular trade takes the case out of the general rule applied in such controversies.[3] Evidence of usage is admissible in mercantile contracts to prove that the words in which the contract is expressed, in the particular trade to which the contract refers, are used in a particular sense and different from the sense which they ordinarily import; and it is also admissible in certain cases, for the purpose of annexing incidents to the contract in matters upon which the contract is silent, but it is never admitted to make a contract or to add a new element to the terms of a contract previously made by the parties. Such evidence may be introduced to explain what is ambiguous, but it is never admissible to vary or contradict what is plain. Evidence of the kind may be admitted for the purpose of defining what is uncertain, but it is never properly admitted to alter a general rule of the law, nor to make the legal rights or liabilities of the parties other or different from what they are by the common law.[4] Cases may arise where such evidence is admissible and material, but as none such was offered in this case it is not necessary to pursue that inquiry. Exceptions also exist to the rule that parol evidence is not admissible to vary or contradict the terms of

[1] The Schooner Freeman, 18 Howard, 187; Maude & Pollock on Shipping, 233; Grant v. Norway, 10 C. B. 665; Zipsy v. Hill, Foster & Finelly, 573; Meyer v. Dresser, 16 C. B. n. s. 657.

[2] The Caroline, 21 Howard, 23; Seabman v. Scott, Law Reports, 2 Q. B. 98; [illegible] v. Garrick, 9 Law Journal, N. S. Exchequer, 356; African Co. v. Lamzed, Law Reports, 1 C. P. [illegible]; Alston v. Herring, 11 Exchequer, 822.

[3] Abbott on Shipping (7th Am. ed.), 346; Smith v. Wright, 1 Cain. 43; Gould v. Oliver, 2 Manning & Granger, 208; Waring v. Mason, 7 Alabama, 343; Falkner v. Earle, 3 East & Smith, 813.

[4] Oelrichs v. Ford, 23 Howard, 63; Barnard v. Kellogg et al., 10 Wallace, 383; [illegible] v. Mar. & Exp., 719; Spartali v. Benecke, 10 C. B. 212.

a written instrument where it appears that the instrument was not within the Statute of Frauds nor under seal, as where the evidence offered tends to prove a subsequent agreement upon a new consideration. Subsequent oral agreements in respect to a prior written agreement, not falling within a statute of frauds, may have the effect to enlarge the time of performance, or may vary any other of its terms, or, if founded upon a new consideration, may waive and discharge it altogether.[1] Verbal agreements, however, between the parties to a written contract, made before or at the time of the execution of the contract, are in general inadmissible to contradict or vary its terms or to affect its construction, as all such verbal agreements are considered as merged in the written contract.[2]

Apply that rule to the case before the court and it is clear that the ruling of the court below was correct, as all the evidence offered consisted of conversations between the shippers and the master before or at the time the bill of lading was executed. Unless the bill of lading contains a special stipulation to that effect, the master is not authorized to stow the goods sent on board as cargo on deck, as when he signs a bill of lading, if in the common form, he contracts to convey the merchandise safely, in the usual mode of conveyance, which, in the absence of proof of a contrary usage in the particular trade, requires that the goods shall be safely stowed under deck; and when the master departs from that rule and stows them on deck, he cannot exempt either himself or the vessel from liability, in case of loss, by virtue of the exception, of dangers of the seas, unless the dangers were such as would have occasioned the loss even if the goods had been stowed as required by the contract of affreightment.[3] Contracts of the master, within the scope of his authority as such, bind the vessel and give the creditor a lien upon it for his security, except for repairs and supplies purchased in the home port, and the master is responsible for the safe stowage of the cargo under deck, and if he fails to fulfil that duty he is responsible for the safety of the goods, and if they are sacrificed for the common safety the goods stowed under deck do not contribute to the loss.[4] Shipowners in a contract by a bill of lading for the transportation of merchandise take upon themselves the responsibilities of common carriers; and the master, as the agent of such owners, is bound to have the cargo safely secured under deck, unless he is authorized to

[1] Emerson *v.* Slater, 22 Howard, 41 ; Gross *v.* Nugent, 5 Barnewall & Adolphus, 65 ; Nelson *v.* Boynton, 3 Metcalf, 402 ; 1 Greenleaf on Evidence, 303 ; Harvey *v.* Grabham, 5 Adolphus & Ellis, 61.

[2] Ruse *v.* Ins. Co., 23 N. Y. 519 ; Wheelton *v.* Hardisty, 8 Ellis & Blackburn, 296 ; 2 Smith's Leading Cases, 758 ; Angell on Carriers, 4th ed., § 229.

[3] The Rebecca, Ware, 210 ; Dodge *v.* Bartol, 5 Greenleaf, 286 ; Walcott *v.* Ins. Co., 4 Pickering, 429 ; Cooper Co. *v.* Ins. Co., 22 id. 108 ; Adams *v.* Ins. Co., id. 163.

[4] The Paragon, Ware, 329, 331 ; 2 Phillips on Insurance, § 704 ; Brooks *v.* Insurance Co., 7 Pickering, 259.

carry the goods on deck by the usage of the particular trade or by the consent of the shipper, and if he would rely upon the latter he must take care to require that the consent shall be expressed in a form to be available as evidence under the general rules of law.[1]

Where goods are stowed under deck the carrier is bound to prove the casualty or *vis major* which occasioned the loss or deterioration of the property which he undertook to transport and deliver in good condition to the consignee, and if he fails to do so the shipper or consignee, as a general rule, is entitled to his remedy for the non-delivery of the goods. No such consequences, however, follow if the goods were stowed on deck by the consent of the shipper, as in that event neither master nor the owner is liable for any damage done to the goods by the perils of the sea nor from the necessary exposure of the property, but the burden to prove such consent is upon the carrier, and he must take care that he has competent evidence to prove the fact.[2] Parol evidence, said Mr. Justice Nelson, in the case of Creery *v.* Holly,[3] is inadmissible to vary the terms or legal import of a bill of lading free of ambiguity; and it was accordingly held in that case that a clean bill of lading imports that the goods are stowed under deck, and that parol evidence that the vendor agreed that the goods should be stowed on deck could not legally be received even in an action by the vendor against the purchaser for the price of the goods which were lost in consequence of the stowage of the goods in that manner by the carrier. Even where it appeared that the shipper, or his agent who delivered the goods to the carrier, repeatedly saw them as they were stowed in that way and made no objection to their being so stowed, the Supreme Court of Maine held that the evidence of those facts was not admissible to vary the legal import of the contract of shipment; that the bill of lading being what is called a clean bill of lading, it bound the owners of the vessel to carry the goods under deck, but the court admitted that where there is a well-known usage in reference to a particular trade to carry the goods as convenience may require, either upon or under deck, the bill of lading may import no more than that the cargo shall be carried in the usual manner.[4] Testimony to prove a verbal agreement that the goods might be stowed on deck was offered by the defence in the case of Barber *v.* Brace;[5] but the court rejected the testimony, holding that the whole conversation, both before and at the time the writing was given, was merged in the written instrument, which undoubtedly is the correct rule upon the subject.

[1] The Waldo, Davies, 162; Blackett *v.* Exchange Co., 2 Crompton & Jervis, 250; 1 Arnould on Insurance, 69; Lenox *v.* Insurance Co., 3 Johnson's Cases, 178.

[2] Shackford *v.* Wilcox, 9 Louisiana, 88. [3] 14 Wendell, 28.

[4] Sproat *v.* Donnell, 26 Maine, 187; 2 Taylor on Evidence, §§ 1062, 1067; Hope *v.* State Bank, 4 Louisiana, 212; 1 Arnould on Insurance, 70; Lapham *v.* Insurance Co., 13 Wharton, 5.

[5] 3 Connecticut, 14.

Written instruments cannot be contradicted or varied by evidence of oral conversations between the parties which took place before or at the time the written instrument was executed; but in the case of a bill of lading or a charter-party, evidence of usage in a particular trade is admissible to show that certain goods in that trade may be stowed on deck, as was distinctly decided in that case.[1] But evidence of usage cannot be admitted to control or vary the positive stipulations of a bill of lading, or to substitute for the express terms of the instrument an implied agreement or usage that the carrier shall not be bound to keep, transport, and deliver the goods in good order and condition.[2]

Remarks, it must be admitted, are found in the opinion of the court, in the case of Vernard *v.* Hudson,[3] and also in the case of Sayward *v.* Stevens,[4] which favor the views of the appellant, but the weight of authority and all the analogies of the rules of evidence support the conclusion of the court below, and the court here adopts that conclusion as the correct rule of law, subject to the qualifications herein expressed. *Decree affirmed.*

GARDEN GROVE BANK *v.* HUMESTON & SHENANDOAH RY. CO.

67 Iowa, 526. 1885.

THE plaintiff seeks to recover of the defendant the sum of $550, which it advanced upon a bill of lading issued by the defendant upon the shipment of certain walnut lumber, and which bill of lading was assigned to the plaintiff. The right of action is based upon the claim that the defendant failed to comply with its contract of shipment, and by negligence delivered the lumber to parties not authorized to receive the same, by which plaintiff was damaged in the amount advanced, and interest. There was a trial by jury, and a verdict and judgment for the defendant. Plaintiff appeals.

ROTHROCK, J. The facts necessary to a determination of the questions of law involved in the case are not disputed. They are as follows: One Henry Zohn was engaged in buying walnut logs and walnut lumber along the line of the railroad of the defendant, and shipping the same to Chicago. About the twentieth day of August, 1881, he caused three cars to be loaded with said lumber, for shipment at Van Wert, a station on the defendant's railroad. Zohn was indebted to Wells Bros. in the sum of $550 for this lumber,

[1] Barber *v.* Brace, 3 Pickering, 13; 1 Smith's Leading Cases, 6th American edition, 837.

[2] The Reeside, 2 Sumner, 570; 1 Duer on Insurance, § 17.

[3] 3 Sumner, 406. [4] 3 Gray, 101.

and on the twenty-third day of August, 1881, before any bill of lading was issued for the shipment of the property, Wells Bros. caused the lumber on said cars to be attached to secure their claim against Zohn. On the same day Wells Bros. and Zohn met at said station, and agreed that the bill of lading should be issued to Wells Bros. as consignors, that they should hold it as security for their claim against Zohn, and that they would take such bill of lading to the Garden Grove Bank, and draw a sufficient amount of money thereon to pay the claim of Wells Bros. The conversation in regard to this arrangement was in the presence of the station agent of the defendant, and he knew, when he issued the bill of lading, that Zohn and Wells Bros. expected and intended to use the same at the Garden Grove Bank to draw or receive money thereon. The said agent thereupon issued and delivered to Wells Bros. a bill of lading, of which the following is a copy: —

"Humeston & Shenandoah R. R. Co. Bill of Lading. Freight Office. Van Wert, August 23, 1881.

"Received from Wells Bros., in apparent good order, by the Humeston & Shenandoah R. R. Co., the following described packages (contents and value unknown) consigned as marked and numbered in the margin, upon the terms and conditions hereinafter contained, and which are hereby made a part of this agreement, also subject to the conditions and regulations of the published tariffs in use by said railroad company, to be transported over the line of this road to Chicago station, and there delivered in like good order to the consignee or owner, at said station, or to such company or carriers (if same are to be forwarded beyond said station) whose line may be considered a part of the route, to the place at destination of said goods or packages; it being distinctly understood and agreed that the responsibility of this company as a common carrier shall cease at the station where delivered or tendered to such person or carrier; but it guaranties that the rate of freight for the transportation of said packages shall not exceed rates as specified below, and charges advanced by this company, upon the following conditions [read the conditions]. The owner or consignee to pay freight or charges as per specified rates upon the goods as they arrive. Freight carried by the company must be removed from the station *during business hours* on the day of its arrival, or it will be stored at the owner's risk and expense; and, in the event of its destruction or damage from any cause while in the depots of the company, either in transit or at the terminal point, it is agreed that the company shall not be liable except as warehousemen. It is agreed, and is a part of the consideration of this agreement, that the company will not be responsible for the leakage of liquors or liquids of any kind; breakage of glass or queensware; the injury or breakage of castings, carriages, furniture, glass show-cases, hollow-ware and looking-glasses, machinery, musical instruments of any kind, packages of eggs, or picture frames; loss of weight of coffee, or grain in bags, or ties in bundles; or for any decay of perishable articles; nor for damage arising from effects of heat or cold; nor for loss of nuts in bags, lemons or oranges in boxes, unless covered with canvas; nor for loss or damage of hay, hemp, cotton, or any goods the bulk of which renders it necessary to transport them in open cars, unless it can be shown that such loss or damage occurred

through negligence or default of the agents of this company. Goods in bond subject to custom-house regulations and expenses. The company is not responsible for accidents or delays from unavoidable cause ; the responsibility of this company, as carriers, to terminate on the delivery or tender of the freight as per this bill of lading to the company whose line may be considered a part of the route to the place of the destination of said goods or packages. In the event of loss of any property for which the carriers may be responsible under this bill of lading, the value or cost of the same at the point and time of shipment is to govern the settlement for the same, except the value of the article has been agreed upon with the shipper, or is determined by the classification upon which the rates are based. And in case of loss or damage of any of the goods named in this bill of lading for which the company may be liable, it is agreed and understood that this company may have the benefit of any insurance effected by or on account of the owner of said goods. This receipt to be presented without erasure or alteration.

Marks and consignees.	Car No.	Description of Articles given by Consignee.	Weight, subject to Correction.
	560 A. & N.....	Walnut lumber . .	22,000
	1006 K. S. J. & C. B.	" " . .	22,000
	9450 S.....	" " . .	22,000

". . . . . Freight to be paid upon the weight by the company's scales, but no single shipment to be rated at less than 100 lbs. Car-load freight subject to the current rules as to the minimum and maximum weights. Charges advanced (if any). *This bill of lading to be surrendered before property is delivered.*

"S. O. CAMPBELL, Freight Agent."

The bill of lading was issued and delivered on the evening of the twenty-third day of August. On the next morning Wells Bros. and Zohn appeared at the Garden Grove Bank, and requested the cashier to advance them $550 on said bill of lading. He consented to do so. Thereupon Wells Bros. assigned the bill of lading to Zohn, and he assigned the same to C. S. Stearns, cashier of the bank, and at the same time Zohn executed a draft of $550 in favor of said cashier to one J. H. Wallace, of Chicago, and the bill of lading, and draft attached thereto, were delivered to the cashier in consideration whereof he advanced and paid for said bank to Wells Bros. the sum of $550.

It will be observed that there is no person named as consignee in the bill of lading. The space under the head of "Marks and Consignees" is left blank. The defendant introduced parol evidence by which it was shown that, when the bill of lading was issued, the name of the consignee was intentionally omitted, because Zohn had not then determined to whom he would ship the lumber. He did not intend to return to Van Wert, and he directed the station agent to ship to Stokes & Son, of Chicago, unless he received other instructions from him by telegraph. No such instructions were

received, and, on the next day, being the same day the plaintiff advanced the money on the bill of lading, the agent of the railroad company shipped the lumber consigned to Stokes & Son, to whom the same was delivered, and it was shipped immediately to Canada. The plaintiff forwarded the bill of lading and draft to Chicago, and demanded the lumber of the C. B. & Q. R. Co., the railroad connecting with defendant, and delivery was refused, because a delivery had already been made to Stokes & Son. Wells Bros. knew of the arrangement between the station agent and Zohn, that the lumber was to be consigned to Stokes & Son unless Zohn should name another consignee; but this arrangement was wholly unknown to the plaintiff until it was too late to prevent the delivery of the lumber to Stokes & Son.

The plaintiff objected to the parol evidence on the ground that it contradicted the written contract as evidenced by the bill of lading. The objection was overruled and the evidence received, and the court instructed the jury as follows: "(4) You are instructed that the bill of lading, as shown upon its face, does not name a consignee, and does not express the full agreement between the parties; and you are instructed that if Zohn and Wells Bros. consented that at the time the way-bills should be made to Stokes & Son, unless the agent should be advised to the contrary, then it was proper for the said agent to ship said lumber to Stokes & Son, and your verdict should be for the defendant. But if there was no such agreement, then the bill of lading is a contract between the parties thereto, whereby said defendant agreed to transfer said lumber to Chicago to Wells Bros. or their assignee. The burden of proof is upon the defendant to establish said agreement. (5) If you find that Wells Bros. and Zohn went to the bank of plaintiff, in order to get money so that Wells Bros.' claim could be satisfied, and you further find that Wells Bros. assigned their interest to said Henry Zohn, that then Zohn drew a draft on Chicago upon said Wallace, which said draft was cashed by the plaintiff, and Zohn then assigned and delivered the bill of lading to the plaintiff, then you are instructed that it was the duty of plaintiffs, in order to protect their rights, to notify the defendant that they were the owners of said bill of lading, and if you find that the defendant shipped said lumber to Stokes & Son, and said consignment was with the consent of Zohn, and he was satisfied with such assignment, and you further find that the defendant did not know that said bill of lading had been assigned to plaintiff, and had no knowledge of plaintiff's rights, then the plaintiff cannot recover in this action, and your verdict should be for the defendant."

These instructions are complained of by counsel for appellant, and, in connection with the admission of the parol evidence, they present the questions which, in our opinion, are decisive of the rights of the parties. A bill of lading is both a receipt and a con-

tract, and in its character as a contract it is no more open to explanation or alteration by parol than other written contracts. This proposition seems to be conceded by counsel for appellee; and the court below, in the fourth instruction cited above, appears to have been of the opinion that, as the contract did not name any one as consignee, it shows upon its face that it does not express the full agreement between the parties, and the parol evidence was doubtless admitted upon the ground that the contract was partly in writing and partly in parol. It is, however, conceded in the same instruction that if it was not agreed by parol that Zohn should designate the consignee, then the bill of lading is a contract whereby the defendant agreed to transfer the lumber to Chicago to Wells Bros. or their assignees. We think the proposition that the bill of lading shows on its face that it is an obligation to convey the property to Chicago and deliver to Wells Bros., or their assignees, is correct, and that it is a complete and valid contract not susceptible of explanation by parol, notwithstanding the space left in the instrument for the name of a consignee does not contain the name of any person. It was an obligation to deliver the goods to Chicago to the "consignee or owner." Wells & Co., according to the contract, were consignors, consignees, and owners. In Chandler *v.* Sprague, 5 Metc. 306, it is said: "Ordinarily the name of a consignee is inserted, and then such consignee or his indorsee may receive the goods and acquire a special property in them. Sometimes the shipper or consignor is himself named as consignee, and then the engagement of the shipowner or master is to deliver them to him or his assigns. Sometimes no person is named; the name of the consignee being left blank, which is understood to import an engagement on the part of the master to deliver the goods to the person to whom the shipper shall order the delivery, or to the assignee of such person;" citing Abb. Shipp., 4th Amer. ed. 215. See, also, City Bank *v.* Railroad Co., 44 N. Y. 136; Low *v.* De Wolf, 8 Pick. 101; Glidden *v.* Lucas, 7 Cal. 26. In Hutchinson on Carriers, § 134, it is said: "When there has been no agreement to ship the goods which will make the delivery of them to the carrier a delivery to the consignee, and vest the property in him, the shipper may, even after the delivery to the carrier, and after the bill of lading has been signed and delivered, alter their destination, and direct their delivery to another consignee, unless the bill of lading has been forwarded to the consignee first named, or to some one for his use. [Citing Blanchard *v.* Page, 8 Gray, 285; Mitchel *v.* Ede, 11 Adol. & E. 888; and other cases.] But, after the carrier or his agent has given one bill of lading or receipt for the goods, he cannot give another, unless the first and all duplicates of the same have been returned to him."

The reason of this rule is obvious. An assignment of a bill of lading operates as a transfer of a title to the property therein

described. As is said in Meyerstein *v.* Barber, L. R. 2 C. P. 45: "While the goods are afloat it is common knowledge, and I would not think of citing authorities to prove it, that the bill of lading represents them; and this indorsement and delivery of the bill of lading, while the ship is at sea, operates exactly the same as the delivery of the goods themselves to the assignee after the ship's arrival would do." Now, it is perfectly manifest that if a carrier may issue a second bill of lading without requiring the return of the first, no reliance can be placed upon any such an instrument by those dealing with the consignor with reference to the property. And the same consequences would ensue if he should be permitted, without the surrender of a bill of lading, to ship the property to any one other than that named in the instrument. In view of the well-known fact that the livestock, grain, and other products of this country are paid for upon advancements made upon bills of lading, just as was done in this case, the interests of commerce seem to require that the rule that no alteration shall be made in contracts of this character without the production of the original should be strictly enforced. The defendant appears to have had due regard to this rule when preparing its blank bills of lading. The last provision therein contained — to wit, "This bill of lading to be surrendered before property is delivered" — was printed across the face of the instrument. It is claimed by counsel that this part of the contract was no part of the mutual obligation, but that it was a provision for the protection of the defendant which it might well waive. It is true, it could, as it did in this case, deliver the property without the surrender of the bill of lading. But it did so at its peril. This bill of lading was issued with a full knowledge that it was intended to procure an advancement of money upon it; but whether the agent had such knowledge or not, third persons dealing with Wells & Co. were justified in believing that their assignee would receive the property upon the surrender of the instrument.

It is claimed, however, and the court below seems to have been of the opinion, that because a bill of lading is not negotiable the defendant had the right to ship the property to Stokes & Co. by the direction of Zohn, and is not liable to the plaintiff because it had no notice that the bill of lading had been assigned to plaintiff. It is true that a bill of lading is not negotiable. It is, however, assignable, and the assignor may maintain an action thereon in his own name. It possesses attributes not common to the ordinary non-negotiable instruments enumerated in section 2084 of the Code. The instruments there enumerated are obligations for the payment of money, or promises to discharge obligations or debts by the delivery of property. Such obligations may be assigned, but they are "subject to any defence or counter-claim which the maker or debtor had against any assignor thereof before notice of his assignments."

It is claimed that the defendant, under this statute, may avail itself of any defence it could have interposed against Zohn, because he was the assignor of the plaintiff. A bill of lading is a different character of instrument. It stands for and represents the property, and an assignment of it passes the title to the property. When issued, it can only be altered or changed, as we have seen, by a surrender of the original, and the contract is that the bill of lading must be surrendered before the property is delivered.

This is a plain contract, which persons dealing with the consignor are justified in believing will be performed. They have also the undoubted right to rely upon the rule that no change can be made in the contract which is issued and sent out into the commercial world, as every business man knows, for the very purpose of using it as the means by which to procure money to move the produce of the country to market. If bankers cannot rely upon bills of lading as being what they plainly import, and in order to protect themselves against private oral agreements between the carrier and the shipper, varying and contradicting the bill of lading, must give notice to the carrier of rights acquired in the property as assignees, it would very seriously embarrass the business interests of the country, and would produce a state of affairs that we think is neither warranted by sound legal principles nor by any consideration of public policy.

We think that the parol evidence should not have been admitted, and that the instructions above set out are erroneous.

Reversed.

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b. *As a Receipt.*

O'BRIEN *v.* GILCHRIST.

34 Maine, 554. 1852.

On exceptions from the District Court, Rice, J.

The defendant was master of the schooner "Grecian." She was lying at the port of King William in Virginia. The plaintiff shipped on board of her a quantity of oak timber to go on freight to East Thomaston in Maine. The bill of lading, signed by the defendant, contained the following expressions: —

"Shipped in good order and condition, by Seth O'Brien, in and upon the good schooner called the 'Grecian,' whereof Cornelius Gilchrist is master for the present voyage and now lying in the port of King William and bound for East Thomaston, viz.: —

"Three hundred seventy-eight pieces of white oak ship timber, amounting to one hundred and thirty-four tons and thirty-two feet,

more or less, and are to be delivered in the like good order and condition, at the said port of East Thomaston," etc.

The timber delivered at East Thomaston was but 351 pieces amounting to one hundred and twenty-three tons, making a deficit from the bill of lading of eleven tons and thirty-two feet. This controversy relates to that deficiency.

The defendant at the trial offered several witnesses to prove that there were not so many pieces nor so many tons received on board as is described in the bill of lading. The plaintiff objected to contradicting the bill of lading by parol, but the court held that, so far as the bill of lading was in the nature of a receipt, it was very strong *prima facie* evidence of the truth of its recitals, but not conclusive; and it was therefore, as to numbers and quantity, liable to be contradicted and overcome by oral testimony, and that as between the parties, all relevant evidence tending to show that the defendant was induced, by misrepresentation or mutual mistake, to sign a bill of lading reciting a larger quantity than had in fact been delivered and received, would be proper for the consideration of the jury.

The verdict was for the defendant, and the plaintiff excepted.

Appleton, J. That a receipt may be contradicted by parol evidence has long been considered well-settled law. The bill of lading, so far as regards the condition of the goods shipped, is *prima facie* evidence of a high nature, but not conclusive. Barrett *v.* Rogers, 7 Mass. 297. The master of a vessel is not authorized to open the packages to ascertain their condition. The principles of public policy and the convenience of transportation forbid that boxes, bales, etc., should be opened and inspected before receipted for by carriers. They therefore may show that they were damaged before coming into their possession. Gowdy *v.* Lyon, 9 B. Mun. 113. The same rule of law has been applied to the quantity of goods therein stated as having been received for transportation. In Bates *v.* Todd, 1 M. & R. 106, Tindal, C. J., said, that he was of opinion that, as between the original parties, the bill of lading is merely a receipt liable to be opened by the evidence of the real facts, and left the question for the jury to determine what number of bags of coffee had been shipped. In Berkely *v.* Watting, 34 E. C. L. 22, it was held, that the defendants were not estopped by the bill of lading to show that goods purporting to be, were not in fact, shipped. In Dickerson *v.* Seelye, 12 Barb. 102, Edmonds, J., in delivering the opinion of the court, says, "as between the shipper of the goods and the owner of the vessel, a bill of lading may be explained so far as it is a receipt; that is, as to the quantity of goods shipped and the like; but as between the owner of the vessel and an assignee for a valuable consideration paid on the strength of a bill of lading, it may not be explained." What may be the rights of an assignee under such circumstances it is not necessary to consider or determine here, as that question does not arise in the present case.

In Wayland *v.* Moseley, 5 Ala. 430, the court say, "that a bill of lading in its character is twofold, viz.: a receipt and a contract to carry and deliver goods. So far as it acknowledges the receipt of goods and states their condition, etc., it may be contradicted, but in other respects it is treated like other written contracts." In May *v.* Babcock, 4 Ohio, 334, the language of the court is, that "a bill of lading is a contract including a receipt." The same doctrine in New York is likewise fully affirmed in Walfe *v.* Myers, 3 Sand. 7. The best elementary writers also concur in this view of the law. 1 Greenl. Ev. § 305; Abbott on Shipping, 324. The evidence, so far as relates to this question, was legally admissible, and the instructions of the court in relation thereto were in conformity with well-established principles.

The evidence offered by way of giving a construction to the meaning of the words "more or less" in the bill of lading, was most clearly inadmissible. The court, however, directed the jury entirely to disregard all evidence, which was designed to control the legal construction of the instrument, and it is to be presumed that the jury in rendering their verdict followed the instructions of the court.

At the same time, the construction of these words, as given in the charge of the judge, was most favorable to the plaintiff.

Exceptions overruled. Judgment on the verdict.

RELYEA *v.* NEW HAVEN ROLLING MILL CO.

42 Conn. (U. S. D. C.) 579. 1873.

Libel for freight-money; tried in the United States District Court for the District of Connecticut, August Term, 1873. The facts of the case are sufficiently stated in the opinion.

Shipman, J. This is a libel *in personam* in favor of the owner and master of the sloop "Carver" to recover freight-money from the respondents. On or about the 8th day of August, 1872, Pettee & Mann engaged the libellant to transport in his sloop a cargo of scrap iron from New York to New Haven. The iron was weighed upon the wharf at New York, and delivered on board the vessel by Pettee & Mann. The captain, on August 8th, 1872, signed three bills of lading, whereby he acknowledged to have received on board the sloop one hundred and nine tons and a specified fraction of a ton, and agreed to deliver the same to the respondents at New Haven, or to their assigns, he or they paying freight at the rate of $2.25 per ton of 2,240 pounds. The captain demurred to signing the bills of lading, as he had not seen the iron weighed, but finally signed them upon the assurance of Pettee & Mann that the quantity was correctly stated.

On the same day the consignors sent by mail to the respondents one of the three bills of lading, and a bill of the iron at $62.50 per ton. This letter was received before the vessel arrived.

The vessel and cargo reached New Haven about the 10th of August. There was a delay of three or four days in discharging, in consequence of the respondents' dock being preoccupied, but the vessel was discharged on the 17th. On the 16th the respondents paid Pettee & Mann in accordance with the quantity stated in the invoice and the bill of lading. On the 17th, when the iron was entirely discharged, the respondents discovered a deficiency of about six tons, and refused to pay for the freight. The libellant delivered all the iron that was put on board his vessel, and which amounted to one hundred and three tons. It is fairly to be inferred that the consignees would not have paid Pettee & Mann until the weight of the iron had been ascertained, had they not relied upon the positive statement of the bill of lading.

The question of law in the case is, whether the consignees, who have advanced money on the faith of a clean bill of lading signed by the master and owner of a vessel, and have been injured thereby, can recoup, in an action for freight-money brought by such master, so much of their loss as does not exceed the libellant's claim for freight.

It is well settled that as between the shipper and the shipowner the receipt in the bill of lading is open to explanation. But the point here is, whether the master and owner are concluded by positive representations as to third persons who have relied upon such statements and have suffered loss thereby? Since the case of Lickbarrow *v.* Mason, 2 T. R. 63, it has generally been considered as settled law, that a bill of lading is a *quasi* negotiable instrument, and when goods are sold by the consignees "to arrive," and the bill of lading is indorsed to the purchaser, who receives the same in good faith, that the consignor's right of stoppage *in transitu* is lost.

The custom of merchants upon a sale of goods which have not arrived is, to deliver the bills of lading to the purchaser, which pass from successive vendor to vendee, and thus become a muniment of title of great value. In such case, the only evidence which the purchaser has of the quantity of goods which he has bought, may be the statement of the master in the bill of lading. This declaration is oftentimes the only source of information upon which the purchaser can safely rely.

It then becomes the duty of the master to see to it that innocent purchasers are not deceived by his incorrect or uncertain representations. In case purchasers are deceived, a corresponding legal liability should be imposed upon him to make good the loss which he has caused. Had the New Haven Rolling Mill Company sold the iron while in transit, and had the purchaser, relying upon the representations of the bill of lading, paid for the full amount therein

stated, there can be little doubt that the master, being also the owner, would have been considered bound by his statements, at least to the extent of his freight-money.

I see no reason why his liability should be diminished when the person who is deceived is the consignee named in the bill of lading. If the consignee has not been misled, and has not suffered loss, in consequence of the bill of lading, he has no cause of complaint. But if it is found that a loss has been suffered, and that such loss happened through a reliance upon an erroneous bill of lading, there is no just reason why the person whose negligence has immediately caused the injury should not also bear the loss.

To this effect is the decision of Judge Nelson, in Bradstreet *v.* Heran, 2 Blatchf. C. C. R. 116. This was a libel *in personam* by the master to recover freight on cotton shipped from New Orleans to New York and consigned to the respondents. The court say: "The consignees made large advances upon the cotton on the faith of the representation in the bill of lading that it was shipped in good order. They are justified in doing so, and their security should not be lessened or impaired by permitting the master to contradict his own representation in that instrument. It might be otherwise if the question arose between the master and the owner of the cotton. The question of damage might in that case be well limited to that accruing in the course of the voyage, notwithstanding the bill of lading. But the respondents stand in the light of *bona fide* purchasers, who became such on the faith of the representation of the master."

In case of Sears *v.* Wingate, 3 Allen, 103, the court hold that the master and owner is bound by the representations in the bill of lading, when the consignee is deceived thereby, provided the statements are those which the master knew or ought to have known were erroneous, and the incorrectness of which he had the means of discovering.

Here the cargo was weighed upon the dock at New York. It is not probable that the master, unless exceedingly diligent, could have verified the accuracy of the weights, or have ascertained the truth or incorrectness of the representations made to him by the consignors. But in my opinion it was his duty either to have ascertained the true weight, or to have refused to sign a clean bill. The master, when he ignorantly signs a bill of lading, whereby he undertakes to deliver a specified quantity, is always in danger of misleading a third person. It is incumbent upon him to avoid that danger, by refusing to sign a bill unless he is satisfied of the accuracy of its contents.

It is claimed by the libellant that the hundred and three tons were accepted, and that the freight-money is therefore to be paid. It is true that there was an acceptance, and that the respondents are liable for the freight-money. But they have nevertheless a right to

recoup against this claim for freight, the damage which they have sustained in consequence of the fault of the master in the same transaction which is the subject of the suit; but such recoupment cannot be to an extent beyond the amount claimed for freight.

The respondents can prosecute this claim for damage, either by an independent suit or libel, or they can by recoupment, "seek to diminish or extinguish the libellant's just claim." Kennedy *v.* Dodge, 1 Benedict, 315; Nichols *v.* Tremlett, 1 Sprague's Decis. 367.

The libellant was also entitled to a small sum for demurrage, but as the price of the six tons of iron was greater than the amount of the freight-money and demurrage, the libel must be dismissed.

POLLARD *v.* VINTON.

105 U. S. 7. 1881.

Error to the Circuit Court of the United States for the District of Kentucky.

The facts are stated in the opinion of the court.

Mr. Justice Miller. The defendant in error, who was also defendant below, was the owner of a steamboat running between the cities of Memphis, on the Mississippi River, and Cincinnati, on the Ohio River, and is sued on a bill of lading for the non-delivery at Cincinnati of one hundred and fifty bales of cotton, according to its terms. The bill of lading was in the usual form, and signed by E. D. Cobb & Co., who were the general agents of Vinton for shipping purposes at Memphis, and was delivered to Dickinson, Williams & Co. at that place. They immediately drew a draft on the plaintiffs in New York, payable at sight, for $5,900, to which they attached the bill of lading, which draft was duly accepted and paid. No cotton was shipped on the steamboat, or delivered at its wharf, or to its agent for shipment, as stated in the bill of lading, the statement to that effect being untrue.

These facts being undisputed, as they are found in the bill of exceptions, the court instructed the jury to find a verdict for the defendant, which was done, and judgment rendered accordingly. This instruction is the error complained of by the plaintiffs, who sued out the present writ.

A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwith-

standing it is designed to pass from hand to hand, with or without indorsement, and it is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in a sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into hands of persons who have innocently paid value for it. The doctrine of *bona fide* purchasers only applies to it in a limited sense.

It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver.

To these elementary truths the reply is that the agent of defendant has acknowledged in writing the receipt of the goods, and promised for him that they should be safely delivered, and that the principal cannot repudiate the act of his agent in this matter, because it was within the scope of his employment.

It will probably be conceded that the effect of the bill of lading and its binding force on the defendant is no stronger than if signed by himself as master of his own vessel. In such case we think the proposition cannot be successfully disputed that the person to whom such a bill of lading was first delivered cannot hold the signer responsible for goods not received by the carrier.

Counsel for plaintiffs, however, say that in the hands of subsequent holders of such a bill of lading, who have paid value for it in good faith, the owner of the vessel is estopped by the policy of the law from denying what he has signed his name to and set afloat in the public market. However this may be, the plaintiffs' counsel rest their case on the doctrine of agency, holding that defendant is absolutely responsible for the false representations of his agent in the bill of lading.

But if we can suppose there was testimony from which the jury might have inferred either mistake or bad faith on the part of Cobb & Co., we are of opinion that Vinton, the shipowner, is not liable for the false statement in the bill of lading, because the transaction was not within the scope of their authority.

If we look to the evidence of the extent of their authority, as found in the bill of exceptions, it is this short sentence: —

"During the month of December, 1873" (the date of the bill of lading), "the firm of E. D. Cobb & Co., of Memphis, Tennessee, were authorized agents of the defendant at Memphis, *with power to solicit freights and to execute and deliver to shippers bills of lading for freight shipped on defendant's steamboat, 'Ben Franklin.'*"

This authority to execute and deliver bills of lading has two limi-

tations; namely, they could only be delivered to shippers, and they could only be delivered for freight shipped on the steamboat.

Before the power to make and deliver a bill of lading could arise, some person must have shipped goods on the vessel. Only then could there be a shipper, and only then could there be goods shipped. In saying this, we do not mean that the goods must have been actually placed on the deck of the vessel. If they came within the control and custody of the officers of the boat for the purpose of shipment, the contract of carriage had commenced, and the evidence of it in the form of a bill of lading would be binding. But without such a delivery there was no contract of carrying, and the agents of defendant had no authority to make one.

They had no authority to sell cotton and contract for delivery. They had no authority to sell bills of lading. They had no power to execute these instruments and go out and sell them to purchasers. No man had a right to buy such a bill of lading of them who had not delivered them the goods to be shipped.

Such is not only the necessary inference from the definition of the authority under which they acted, as found in the bill of exceptions, but such would be the legal implication if their relation to defendant had been stated in more general terms. The result would have been the same if it had been merely stated that they were the shipping agents of the owner of the vessel at that point.

It appears to us that this proposition was distinctly adjudged by this court in the case of Schooner Freeman *v.* Buckingham, 18 How. 182.

In that case the schooner was libelled in admiralty for failing to deliver flour for which the master had given two bills of lading, certifying that it had been delivered on board the vessel at Cleveland, to be carried to Buffalo and safely delivered. The libellants, who reside in the city of New York, had advanced money to the consignee on these bills of lading, which were delivered to them. It turned out that no such flour had ever been shipped, and that the master had been induced, by the fraudulent orders of a person in control of the vessel at the time, to make and deliver the bills of lading to him, and that he had sold the drafts on which libellants had paid the money and received the bills of lading in good faith.

A question arose how far the claimant, who was the real owner, or general owner, of the vessel could be bound by the acts of the master appointed by one to whom he had confided the control of the vessel, and the court held that, having consented to this delivery of the vessel, he was bound by all the acts by which a master could lawfully bind a vessel or its owner.

The court, in further discussing the question, says: "Even if the master had been appointed by the claimant, a wilful fraud committed by him on a third person by signing false bills of lading would not be within his agency. If the signing of a bill of lading

was not the master of the vessel, no one would suppose the vessel bound; and the reason is, because the bill is signed by one not in privity with the owner. But the same reason applies to a signature made by a master out of the course of his employment. The taker assumes the risk, not only of the genuineness of the signature, and of the fact that the signer was master of the vessel, but also of the apparent authority of the master to issue the bill of lading. We say the apparent authority, because any secret instructions by the owner, inconsistent with the authority with which the master appears to be clothed, would not affect third persons. But the master of a vessel has no more apparent authority to sign bills of lading than he has to sign bills of sale of the ship. He has an apparent authority, if the ship be a general one, to sign bills of lading for cargo actually shipped; and he has also authority to sign a bill of sale of the ship when, in case of disaster, his power of sale arises. But the authority in each case arises out of and depends upon a particular state of facts. It is not an unlimited authority in one case more than in the other; and his act in either case does not bind the owner even in favor of an innocent purchaser, if the facts on which his power depended did not exist; and it is incumbent upon those who are about to change their condition upon the faith of his authority, to ascertain the existence of all the facts upon which his authority depends."

The court cites as settling the law in this way in England the cases of Grant *v.* Norway, 10 C. B. 665; Coleman *v.* Riches, 16 id. 104; Hubbersty *v.* Ward, 8 Exch. Rep. 330; and Walter *v.* Brewer, 11 Mass. 99. See also McLean & Hope *v.* Fleming, Law Rep. 2 H. of L. Sc. 128; Maclachlan's Law of Merchant Shipping, 368, 369.

It seems clear that the authority of E. D. Cobb & Co., as shipping agents, cannot be greater than that of the master of a vessel transacting business by his ship in all the ports of the world.

And we are unable to see why this case is not conclusive of the one before us, unless we are prepared to overrule it squarely. The very questions of the power of the agent to bind the owner by a bill of lading for goods never received, and of the effect of such a bill of lading as to innocent purchasers without notice, were discussed and were properly in the case, and were decided adversely to the principles on which plaintiffs' counsel insist in this case. Numerous other cases are cited in the brief of counsel in support of these views, but we deem it unnecessary to give them more special notice.

The case of New York & New Haven Railroad Co. *v.* Schuyler, 34 N. Y. 30, is much relied on by counsel as opposed to this principle.

Whatever may be the true rule which characterizes actions of officers of a corporation who are placed in control as the governing force of the corporation, which actions are at once a fraud on the corporation and the parties with whom they deal, and how far

courts may yet decide to hold the corporations liable for such exercise of power by their officers, they can have no controlling influence over cases like the present. In the one before us it is a question of *pure agency*, and depends solely on the power confided to the agent.

In the other case *the officer is the corporation* for many purposes. Certainly a corporation can be charged with no intelligent action, or with entertaining any purpose, or committing any fraud, except as this intelligence, this purpose, this fraud, is evidenced by the actions of its officers. And while it may be conceded that for many purposes they are agents, and are to be treated as the agents of the corporation or of the corporators, it is also true that for some purposes they are the corporation, and their acts as such officers are its acts.

We do not think that case presents a rule for this case.

Judgment affirmed.

SIOUX CITY AND PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* FIRST NATIONAL BANK OF FREMONT, DEFENDANT IN ERROR.

10 Neb. 556. 1880.

MAXWELL, CH. J. . . . . .

It will be seen that the object of the action is to hold the railroad company liable on two bills of lading executed by its station agent to one Watkins, one of said bills being dated Nov. 13th, 1877, for two cars of wheat, and the other dated Nov. 15th, 1877, for three cars of wheat, which bills of lading were transferred to the bank, the bank advancing $1,500 on them, relying on the statements therein contained that Watkins had shipped five full cars of wheat, when in fact the cars mentioned in the first receipt contained about one-half a car-load of wheat and about one-half a car-load of barley, and the three cars mentioned in the second receipt were never in fact shipped, and no wheat was in fact received by the railroad company at the time the receipt was given. Is the company liable under such circumstances upon the bills of lading? In the case of Grant *v.* Norway, 2 Eng. Law and Eq. 337, it was held that the master of a ship has no general authority to sign a bill of lading for goods which are not put on board the vessel; and consequently the owners of the ship are not responsible to parties taking a bill of lading which has been signed by the master without receiving the goods on board. This case was decided in the common pleas in 1851. No authorities are cited by the court to sustain its position, the court saying: "There is but little to be found in the books on this subject; it was discussed in the case of Berkley *v.* Watling, 7 Ad. and El. 29; but

that case was decided on another point, although Littledale, J., said in his opinion the bill of lading was not conclusive under similar circumstances on the shipowner." This decision was followed in Hubbersty *v.* Ward, 18 id. 551, in the Court of Exchequer, Pollock, C. B., placing the decision upon a lack of power in the master. See also Coleman *v.* Riches, 29 id. 329. These decisions were followed by the Supreme Court of the United States in the case of the Schooner Freeman *v.* Buckingham, 18 How. 182. In that case the claimant, being the sole owner of the schooner named, contracted with one John Holmes to sell it to him for the sum of $10,000, payable by instalments at different dates. By the terms of the contract John Holmes was to take possession of the vessel, and if he should make all the agreed payments, the claimant was to convey to him. The vessel was delivered to Holmes under this contract, and he had paid one instalment, the only one which had become due. Holmes permitted his son, Sylvanus Holmes, to have the entire control and management of the vessel and to appoint the master. Sylvanus Holmes transacted business under the style of S. Holmes & Co., and the flour mentioned in the bills of lading as having been shipped by him was never in fact shipped, the master having been induced to sign the bills of lading by fraud and imposition. The question before the court is thus stated in the opinion: "But the real question is, whether in favor of a *bona fide* holder of such bills of lading procured from the master by the fraud of an owner *pro hac vice*, the general owner is estopped to show the truth, as undoubtedly the special owner would be." It was held that the maritime law gave no lien upon the vessel, and that the general owner thereof was not estopped from alleging and proving the facts. In the case of Dean *v.* King, 22 Ohio State, 118, it was held in an action by the shipper against the owner of a steamboat engaged in the business of common carriers, to recover for goods as per bill of lading, that the defendants are liable only for so much of the goods as was actually received on the boat or delivered to some one authorized to receive freight on her account. This seems to have been an action between the original parties. In Dickerson *v.* Seelye, 12 Barb. 99, the court held that as between the shipper of the goods and the owner of the vessel a bill of lading may be explained as to the quantity and condition of the goods, yet it cannot be so explained as between the owner of the vessel and a consignee or assignee of the bill of lading who has in good faith advanced money on the strength of it, and has thus been induced by the master's signing the bill to do an act changing the situation of the parties. In such case the bill of lading is conclusive on the owner in respect to the quantity of goods. The court say: "As between the owner of the vessel and an assignee for a valuable consideration paid on the strength of the bill of lading, it may not be explained; Portland Bank *v.* Stubbs, 6 Mass. 422; Abbott on Shipping, 323–4; Brad-

street *v.* Lees, M. S., U. S. District Court. In such case the superior equity is with the *bona fide* assignee who has parted with his money on the strength of the bill of lading."

In the case of Armour *v.* Michigan C. R. R. Co., 65 N. Y. 111, the defendant's agent, having authority to issue bills of lading, upon delivery to him by M. of a forged warehouse receipt, issued to M. two bills of lading, each stating the receipt of a quantity of lard consigned to plaintiffs at New York, and to be transported and delivered to them. M. drew sight drafts on the plaintiffs, to which he attached the bills of lading; these were delivered to a bank and were forwarded to New York, and the drafts were paid by plaintiff upon the faith and credit of the bills of lading. It was held that the defendant was bound by the acts of its agent, the same being within the apparent scope of his authority, and was estopped from denying the receipt of the lard. In the case of the Savings Bank *v.* A. T. & S. F. R. R. Co., 20 Kansas, 519, the court held that where the agent of a railroad company has authority to receive grain for shipment over its road, and issues in the name of the corporation a bill of lading for each consignment received, and issues two original bills of lading for a single consignment, the two bills of lading having been assigned to the bank, which advanced money thereon in good faith, and the shipper being insolvent and having absconded, that the railroad company was estopped by its statement and promise in the bill of lading to deny that it has received the grain mentioned therein. The court say: "The custom of grain-dealers is to buy of the producer his wheat, corn, barley, etc., then deliver the same to the railroad company for shipment to market. The railroad company issues to the shipper its bill of lading. The shipper takes his bill of lading to a bank, draws a draft upon his commission merchant or consignee against the shipment, and attaches his bill of lading to the draft. Upon the faith of the bill of lading and without further inquiry the bank cashes the draft, and the money is thus obtained to pay for the grain purchased, or to repurchase other shipments. In this way the dealer realizes at once the greater value of his consignments, and need not wait for the returns of the sale of his grain to obtain money to make other purchases. In this way the dealer with a small capital may buy and ship extensively; and while having a capital of a few hundred dollars only, may buy for cash and ship grain valued at many thousands. This mode of transacting business is greatly advantageous both to the shipper and the producer. It gives the shipper who is prudent and posted as to the markets almost unlimited opportunities for the purchase and shipment of grain, and furnishes a cash market for the producer at his own door. It enables the capitalist and banker to obtain fair rates of interest for the money he has to loan, and insures him, in the way of bills of lading, excellent security. It also furnishes additional business to railroad companies, as it facilitates and increases

shipments to the markets. A mode of doing business so beneficial to so many classes ought to receive the favoring recognition of the courts to aid its continuance." The question whether or not bills of lading are negotiable does not enter into the case. All the testimony shows that the bills of lading in controversy were issued by an authorized agent of the railroad company, and that he not only had authority to issue such bills, but it was one of the duties imposed upon him. As against an innocent purchaser of the bills it will not do to say that the agent had authority to issue bills of lading duly signed, only in cases where shipments were made, and no authority where shipments were not made. The company itself has invested its own agent with the authority to issue bills of lading, and when duly issued they are not the bills of the agent, but of the railroad company. The representations, therefore, thus made in the bills that the company has received a certain quantity of grain for shipment, is a representation to any one who, in good faith relying thereon, sees fit to make advances on the same. If these representations are false, who should bear the loss? The party who appointed, placed confidence in, and gave authority to make the bills, or the one that in good faith, relying thereon, purchased or advanced money on the same? In Lickbarrow *v.* Mason, 2 T. R. 63, 1 Smith's Leading Cases, 6 Am. ed., 1044, Ashhurst, J., says: "We may lay it down as a broad, general principle, that whenever one of two innocent persons must suffer by the acts of a third, he who has enabled said third person to occasion the loss must sustain it."

This case presents every element necessary to constitute an estoppel *in pais*, a representation made with full knowledge that it might be acted upon, and subsequent action in reliance thereon, by which the defendants in error would lose the amount advanced if the representation is not made good. This principle was entirely overlooked in Grant *v.* Norway, and the cases following it. The defendant in the court below is therefore liable to the bank to the extent of the amount advanced on faith of these bills, not exceeding the value of the grain certified to as having been shipped. Objections are made to the proof of the price of wheat at Scribner at the time stated in the bills, to proof in reference to the grade of wheat shipped from that place, and to the weight of an ordinary car-load, but as the verdict is for several hundred dollars less than the amount advanced by the bank on the bills of lading in question, and much less than it should have recovered, it is unnecessary to consider them. There is no error in the record of which the plaintiff in error can complain, and the judgment must be affirmed.

Judgment affirmed.

7. DELIVERY BY CARRIER.

A. To terminate Exceptional Liability.

HYDE *v.* NAVIGATION COMPANY.

King's Bench. 5 Term R. 389. 1793.

This was an action on the case against the defendants as common carriers. The declaration stated that the defendants were common carriers of goods for hire from Gainsborough, in the county of Lincoln, to Manchester, in the county of Lancaster. That the plaintiffs on the 28th September, 1789, delivered the defendants eighteen bags of cotton, to be safely carried by the defendants from Gainsborough to Manchester, and there to be delivered to the plaintiffs, etc., and that the defendants undertook to carry and convey, etc., and there deliver them, which they neglected, etc. The second count was upon a delivery of fourteen other bags of cotton, to be carried by the defendants from Bromley Common, in the county of Stafford, to Manchester, and there to be delivered to the plaintiffs; that the defendants undertook, etc., and that the goods were lost through their negligence.

It appeared at the trial that the goods were put on board the defendant's barges at the respective places mentioned in the declaration, and conveyed therein along the defendant's navigation and the Duke of Bridgewater's canal to Manchester, where they were landed upon the quay, and lodged there in the Duke of Bridgewater's warehouse, in which place they were consumed by an accidental fire the same night. In the bills made out by the defendants, there were charges of so much for tonnage on the river Trent, so much for tonnage on the Trent and Mersey Navigation, so much for the Duke of Bridgewater's canal, so much for warehouse room for the Duke of Bridgewater; besides which, in the bill for the fourteen bags was a charge for cartage, which was intended for the cartage from the Duke of Bridgewater's warehouse to the plaintiff's own warehouse in Manchester, and which was paid by the plaintiffs when the goods were put on board the defendant's barges; but the charge for warehouse room was merely received by the defendants as agents to the duke, and they had no share of the profit. It appeared also to be the practice of many persons in Manchester, for whom goods were brought by the defendants, to send their own carts for the goods from the quay or warehouse, but the usage had uniformly been for the cotton merchants to have their goods conveyed to their own warehouse in carts furnished by the defendants. Formerly the defendants employed their own carts for this purpose, but had

latterly given up this business, together with the profits derived from it, to a person named Hibbert, who was their book-keeper; and the plaintiffs knew that the cartage had been received for this man. Previous to this transaction the defendants had circulated the following printed notice: "Navigation from the Trent to the Mersey. Conveyance of goods by land and navigation to and from London, Manchester, Warrington, Liverpool, Chester, most parts of the North, the Staffordshire Potteries, and their environs. The proprietors, having hitherto labored under several inconveniences to make their conveyance worthy the attention of merchants, etc., have at length removed every obstacle, and can now promise to deliver goods each way in ten days with the utmost punctuality, and at a much reduced price, to an inland conveyance," etc. Since this transaction, upon the arrival of goods, etc., at the quay at Manchester, the defendants have sent written notices of the same to the owners, desiring them to order the goods away as soon as possible, as they remained at the risk of the owners. A verdict was found for the plaintiffs at the sittings after last term at Guildhall, before Lord KENYON; to set aside which a rule having been obtained.

Lord KENYON, Ch. J. This is a question of very general concern, since few days in the year occur in which cases do not arise that may depend upon it; and therefore it were to be wished that this case should have called for a decision upon the point, which should have left no doubt in future respecting the extent to which common carriers are liable. But peculiar circumstances exist in this case, which render it unnecessary to decide the general question; though as the whole has been argued at the bar, I will give my opinion on the general, as well as the particular, question made. I lay no stress on the circumstances so much relied on, that the defendants named themselves on their card, "carriers *by land* and navigation;" that was introduced in order to advertise the public that they would carry the whole distance from London to the most extreme point, including, in several places, intervals by land between one navigable cut and another; this, therefore, could have no reference to the article of carriage from the navigation at Manchester to the plaintiffs' warehouse. On the point of law, the rule is too clear to admit of any doubt; the only question is respecting the application of the facts in this case to it. Whether at the time when the accident happened the goods were in the custody of the defendants as *common carriers?* because if they were, by the strict rules of the law the defendants are responsible, carriers being insurers in all cases except in two. That the plaintiffs' goods were in the custody of the defendants as carriers, when they were navigated on their own canal, there is no doubt; it is equally clear that they were so during the time when they were on the Duke of Bridgewater's canal, which is open to the public, they paying the Duke tonnage on it; it is as

clear that when the goods arrived at Manchester, they were unloaded with due care and circumspection, and deposited in the Duke of Bridgewater's warehouse; after this a further act was to be done, the goods were to have been taken away in carts, but not by the defendants, for, though they formerly kept carts and carried away the goods of their customers to their respective houses, for some time past they have ceased to have any concern with the carts, or to derive any advantage from cartage whatever; the carts themselves and all the benefits arising from that part of the business belonging to Hibbert. If indeed there had been any fraud in this transaction, as if the defendants had induced the public to believe that they would be responsible in all cases, and, in order to excuse themselves, had relied on some secret agreement between them and Hibbert, that might have varied the case; but in the first place we cannot presume fraud, and in the next, there are no facts in the case from which we could presume it. If the defendants here be liable, consider how far the liability of carriers will be extended: it will affect the owners of ships bringing goods from foreign countries to merchants in London: are they bound to carry the goods to the warehouses of the merchants here, or will they not have discharged their duty on landing them at the wharf to which they generally come? It would be strange, indeed, if the owners of a West Indiaman were held liable for any accident that happened to goods brought by them to England, after having landed them at their usual wharf. The instance of game, which has been mentioned at the bar, shows the general sense and understanding of the public on this subject. The different claims of the respective persons concerned are separately marked on the direction. The carrier who receives a certain sum for carrying the game, is not bound, in consideration of that sum, to deliver the goods; he has performed his duty when he has brought the game to the inn where he puts up; then the business of the porter begins. I am not aware that it has ever been decided that it is the duty of the carrier to deliver such goods at the house of every individual person to whom they are directed; if it has, the action brought by Mr. Price against the keeper of the Bell Inn was misconceived; it should have been brought against the carrier, and not the innkeeper; and yet it did not occur to the defendants' counsel, in that case, to make such an objection. When goods are sent by a coach, a letter of advice should also be sent to the person to whom they are directed that he may send for them: or the price which the porter expects to receive for delivering them will induce such porter to carry them; but the carriage and porterage constitute distinct charges.

In this case, however, there is one peculiar circumstance, which makes it unnecessary to decide the general question, and that is the charge made by the defendants in one of their bills for the cartage at Manchester, for that charge the defendants undertook to deliver

the goods. Therefore, without deciding the general question, I think the plaintiffs are entitled to the verdict which they have obtained. On the general point, I have great doubts; the leaning of my mind at present is, that carriers are not liable to the extent contended for.

Ashhurst, J. I am glad to find one circumstance which puts the case out of all doubt; namely, that one of the bills contains a charge for the wharfage and cartage; which is decisive to show that in this case the liability of the defendants continued until the goods were delivered. Had it not been for this circumstance, I should have desired further time to consider the case. The inclination of my opinion on the general question is, that a carrier is bound to deliver the goods to the person to whom they are directed. A contrary decision would be highly inconvenient, and would open the door to fraud; for if the liability of a carrier were to cease when he had brought the goods to any inn where he might choose to put up his coach, and a parcel containing plate or jewels, brought by him, were lost before it was delivered to the owner, the latter would only have a remedy against a common porter. It has been said, however, that it is the practice of many persons to send to the inn for their goods; but that does not prove that the carrier is not bound to deliver them, if they do not send. If the owner choose to send for his goods, that merely discharges the carrier from his liability in that case; it only dispenses with the general obligation thrown by the law upon the carrier; but it does not apply to the other cases where that obligation is not dispensed with. But on this question I do not mean to give any decided opinion.

Buller, J. Upon the general question my opinion coincides with that given by my brother Ashhurst; and according to the defendants' own argument great inconveniences would result to the public from adopting any other rule. According to their argument, there must be two contracts in all cases where goods are sent by a coach or a wagon; but I think the same argument tends to establish the necessity of three,— one with the carrier, another with the innkeeper, and a third with the porter. But in fact there is but one contract: there is nothing like any contract or even communication between any other person than the owner of the goods and the carrier; the carrier is bound to deliver the goods, and the person who actually delivers them acts as the servant of the carrier. This does not militate against the decision in the action alluded to against the innkeeper. In general it happens that the innkeeper in London has some interest or concern in the coaches and wagons that put up at his house; in those cases he is liable as carrier; but even if this fact were not proved in that case, the porter was considered as the servant of the innkeeper; and if the latter insisted, by his servant, that he would not part with the game until he had received more than he was entitled to, he was a wrong-doer and liable to an action of trover.

It has been said too, that the place of a porter is valuable, and is the subject of a purchase: but who sells the place? Who agrees with him that he shall be the porter? Not the person to whom the goods are sent, but the carrier and the innkeeper, whom I consider as the same person. But if the innkeeper have no share in the profits of the carriage, and receives the goods for the purpose of delivering them to the owners, then the innkeeper is the servant of the carrier as well as the porter. Therefore, whether there be the innkeeper and the porter, or the porter only, the carrier is liable in all cases where the goods are lost after they get into the hands of the innkeeper or porter, because they are delivered to those persons with the consent, and as the servants, of the carrier. It does not appear to me that the difficulties suggested respecting foreign ships exist. When goods are brought here from foreign countries, they are brought under a bill of lading, which is merely an undertaking to carry from port to port. A ship trading from one port to another has not the means of carrying the goods on land: and, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier.

In this case, however, I have not the least doubt. The expression in the card, circulated by the defendants, "carriers by land and navigation," cannot indeed have much weight for the reason given; but I rely on the charge which the defendants compelled the plaintiffs to pay before they would engage to deliver the goods. Hibbert was originally a servant to the defendants; and though he has since, by agreement with them, undertaken the cartage on his own account, and received the whole profits of it himself, that cannot affect third persons. The different proprietors may divide the profits among themselves in any way they choose, but they cannot by their own agreement with each other exonerate themselves from their liability to the owner of the goods. The carriers have the direction of the goods, and are responsible for them until they are delivered to the owner; and here the defendants insisted on receiving a certain sum of money for the whole expense of carrying and delivering, including the identical charge of cartage, before they would take the goods into their vessel. If the carrier and porter were to make separate contracts with the owner of the goods, the latter would at least have the option of sending his own carts to bring away his goods; whereas here the defendants put the goods into the Duke of Bridgewater's warehouse at once, in order to send them afterwards to the plaintiffs by a particular cart of their own. The defendants say, however, that they are warehouse-men as well as carriers. That they may fill those two different characters at different times, I am ready to admit; but I deny that they can be both warehouse-men and carriers at the same instant. In this case they received the goods in the capacity of carriers; and, as the engagement was to carry and *deliver* them, the goods remained in

their custody as carriers the whole time. The case of Garside against these defendants is perfectly distinguishable from the present: there the engagement on the part of the defendants was merely to carry the goods to Manchester; and, having discharged their duty in carrying them to that place, their liability ceased. It was proved in that case, that if the defendants had had the means of forwarding the goods from Manchester to Stockport, they were ready to have delivered them to the Stockport carrier; but no such carrier being then arrived, what were the defendants to do? They had carried the goods to the place of delivery according to their contract, and there being no one there ready to receive them, the next thing to be done was to deposit them in a place of safe custody, and then their contract was at an end. But in this case the contract was not only to carry, but to *deliver*, the goods at Manchester; and the plaintiffs had not the option of taking them from the quay before they were put into the warehouse by the side of the canal. The preference given by the defendants to Hibbert, respecting the cartage, is also a material circumstance: it is like the case of an innkeeper, who agrees with his head hostler, that the latter shall supply the customers with post-horses; in which case, if goods be lost, the innkeeper is liable, because he holds himself out to the public as the responsible person, and his engagement with his servants cannot vary the contract between him and the public. So, in this case Hibbert was the servant of the defendants, and the goods were still in the custody of the defendants as carriers, at the time when the fire happened.

Grose, J. The question in this cause is, Whether the plaintiff's goods, when they were consumed by the fire, were or were not in the custody of the defendants as *common carriers?* Undoubtedly they were so, unless the defendants had, according to their undertaking, delivered them to the plaintiffs. And then arises the material question, Whether the delivery of the goods at the warehouse at Manchester were a delivery to the plaintiffs? It seems to me that upon the circumstances of this case it cannot be considered to be a delivery to them. Whether it be or be not a delivery, may depend on the general custom of the trade, or the particular usage which has prevailed between the parties themselves. As to the general custom, it is a strong circumstance against the defendants that the cotton merchants have never been accustomed to send their own carts for their goods, but those goods have been sent to their respective owners either by carts belonging to, or procured by, the defendants. And in the present case the particular transaction is decisive against the defendants; for the cartage was demanded of, and paid by, the plaintiffs, before the goods were put on board the defendants' vessel; and from that circumstance the defendants undertook to deliver the goods at the place where the carts were to carry them. They did not deliver them at that place; the delivery

at the warehouse was not a delivery to the plaintiffs according to this contract. So much for the circumstances of this case, which leave no room for doubt. On the general question of law I am not so perfectly clear, and if it had been necessary to have decided this case on the general law, I should have desired further time to consider of it. As far, however, as I have considered this case, the strong inclination of my opinion is, that the defendants would be liable as common carriers. The law, which makes carriers answerable as insurers, is indeed a hard law; but it is founded on wisdom, and was established to prevent fraud. But it seems to me, that it would be of little importance to determine that carriers were liable as insurers, unless they were also bound to see that the goods were carried home to their place of destination; since as many frauds may be practised in the delivery as in the carriage of them. In general the carrier appoints a porter who provides a cart for the purpose of delivering the goods; but it would be open to an infinity of frauds, if the carrier could discharge himself of his responsibility by delivering them to a common porter, a person of no substance, a beggar, of whose name the owner of the goods never heard, and against whom, in the event of the goods being lost, there could be no substantial remedy. In this case the carriers fixed on the particular warehouse at which the goods were deposited on their arrival at Manchester, and made an agreement with their own servant Hibbert, respecting the cartage. The defendants, therefore, ought to be answerable for the acts of those persons whom they nominate. With respect to the case of Garside against this company; there the goods were delivered at least as far as the defendants were bound to deliver them. The case of foreign goods brought to this country depends on the custom of the trade, of which the persons engaged in it are supposed to be cognizant: by the general custom the liability of ship-carriers is at an end when the goods are landed at the usual wharf. On the particular circumstances of this case I am clearly of opinion that the verdict is right. And on the general question of law, I do not mean to be bound by the opinion I have now given, though at present I think that common carriers are answerable if the goods be lost at any time before they are delivered to the owners. *Rule discharged.*

BALDWIN, PLAINTIFF IN ERROR, *v.* AMERICAN EXPRESS COMPANY, DEFENDANT IN ERROR.

23 Ill. 197. 1859.

This was an action of *assumpsit* brought at the April Term of the Cook County Circuit Court by the plaintiff in error, to recover the value of a package of money which the defendant, as a common

carrier, undertook to convey from Chicago, Illinois, to Madison, Wisconsin, and there to be delivered to D. J. Baldwin, or his authorized agents, and which undertaking the said defendant failed to perform.

Breese, J. The question in this case is, was there sufficient evidence of a delivery of this package, or of an offer to deliver, as will discharge the liability of the express company as a common carrier, or change it into the liability of a depository simply.

There is no count in the declaration against the defendant, charging any other contract with it than that as a common carrier, and consequently, all evidence in relation to the security of the safe, or the absence of a night watch, is out of the question. The defendant can only be liable as a common carrier, and in no other character on this declaration. We do not consider there is any offer to deliver this package either to the officers of the Dane County Bank or to Flowers, or to any one in his employment authorized to receive it, proved.

The testimony of Douglas, the agent of the express company, taken in connection with that of Memhard, the messenger, of Treadway, one of the employees of the bank, and of Brown, the cashier of the bank, and of Willis, the clerk of Flowers, all go to show that the package was not ever tendered by Douglas to either of them, and he shows most clearly that the package was at no time ready for delivery, either to the bank or to Flowers, for he says it was the custom at the express office to enter the packages received in a delivery book, which is also the receipt book, and by which book they deliver to consignees, who sign a receipt in this delivery book. Now this package was never entered on this book, and of course was not ready for delivery.

The bank had no opportunity to refuse to receive the package, for it was not offered to any officer of the bank. One or more of them was informed there was such a package there for Baldwin, but though the bank office was not five steps distant, and in the same building with the express office, the express agent did not take it to the bank, and there offer to deliver it. It was not offered to Flowers, or his clerk, at his place of business. The clerk was merely told by the messenger when making his rounds, there was a package for Baldwin at the office, and the clerk said he would "go round and see about it." When at the office, the package was not offered to him, and if it had been, he would not have been authorized to receive it at the office, it not having been entered on the delivery book, and the custom of the express company being shown to be, at Madison, to deliver by that book to the consignees in person, or to their authorized agent, at their place of business. An offer to deliver at the express office, if that was proved, under such circumstances, amounted to nothing.

Mr. Fargo, the general agent of this company, says, "we deliver

goods actually to the person, or by notice," by which we would understand, that at important towns on their routes, and at the termination of their routes at important towns, they deliver personally; at way-stations by notice, and by depositing the goods or packages in a safe receptacle, if that be the known custom of the company. Such a custom may be reasonable, and therefore legal, and if well-established, parties will be presumed as having contracted with reference to it; but at small stations, where the business will not justify them in keeping a special delivery agent, prompt notice should be given to the consignee, in order to discharge them from the strict liability of common carriers. Mr. Van Vleet, the check clerk in the United States express office, says that "the general method of conducting an express business is to take receipts in a receipt book, which is called the delivery book." This was the custom, as proved by Douglas of the defendants, at Madison.

The cases cited by defendant's counsel, of vessels and railroad companies delivering goods at their landings or depots with or without notice, cannot meet such a case as this, where the undertaking is to deliver in person.

It is the settled doctrine of England and of this country, that there must be an actual delivery to the proper person, at his residence or place of business, and in no other way can he discharge himself of his responsibility as a common carrier, except by proving that he has performed such engagement, or has been excused from the performance of it, or been prevented by the act of God or a public enemy.

Stephenson *v.* Hart, 4 Bing. 476; Garnett *v.* Willan, 5 Barn. & Ald. 53; Duff *v.* Budd, 3 Brod. & Bing. 177; Hyde *v.* The Navigation Company, from the Trent to the Mersey, 5 T. R. 389 [**260**]; 2 Kent Com. 604; Gibson *v.* Culver, 17 Wend. 305; Eagle *v.* White, 6 Wharton, 505; Moore *v.* Sheindine, 2 Har. & McHen. 453; Chickering *v.* Forolm, 4 Mass. 453; Young *v.* Smith, 3 Dana, 92.

It is necessary, in order to give one security to property, this rigid rule should obtain, and it has for years been enforced against common carriers. They are considered as insurers, and are under that responsibility; and to prevent litigation, and avoid the necessity of going into the examination of matters difficult to be unravelled, the law very justly, in case of loss, presumes against them. The rule being so rigorous, they are entitled to demand, and do demand, a compensation for their services in full proportion, at least, to the risks incurred. The company in this case have shown no excuse for the non-delivery of the package. The facts and the law are against them. We have not the opportunity to examine the case of Marshall *et al. v.* Henry Wells *et al.*, in 6 Wisconsin, 7 Wis. 1, referred to by defendant's counsel, in which this company prevailed, as it is said, upon the same state of facts upon which we have adjudicated. We are inclined to think there must have been

some circumstance in that case not found in this, which determined the recovery. It may be the proof in that case showed the entry of the package on the delivery book, and an offer at the bank perhaps, after bank hours, and a refusal to receive it on that account, or some other controlling fact not appearing in this record.

If not so, then we can only say, we differ from the Supreme Court of Wisconsin in our view of the law upon the facts presented.

The judgment of the Circuit Court is reversed, and the cause remanded.

PACKARD *v.* EARL.

113 Mass. 280. 1873.

Tort against the defendants as common carriers for the loss of a trunk and its contents, intrusted to them to be carried from Providence, Rhode Island, to West Mansfield, Massachusetts, and to be there delivered to the plaintiff.

At the trial in the Superior Court, before Pitman, J., it appeared that the defendants were express carriers over the line of the Boston & Providence Railroad from Providence to Boston, and intermediate stations; that the trunk was delivered to them at their office in Providence, on Saturday, March 2, 1872, to be carried by them as expressmen to the plaintiff at West Mansfield, a station on the railroad; that it was marked "Henry M. Packard, West Mansfield;" that no special directions as to the delivery were given; that the plaintiff did business in Wrentham, during the week, and was accustomed to spend Sundays at his father's house, about one-half of a mile from the West Mansfield station; that the Boston & Providence Railroad Company had had a depot at West Mansfield for about twenty years, where some of their trains had stopped for receiving and leaving passengers and merchandise; that the defendants and other express carriers on the line of the railroad had been accustomed to deliver and receive at that station, parcels, carried and to be carried by them employing the station agent and switch-tender as their agents; that the amount of express business there was very small; that no messenger had ever been employed there by any express carriers for the delivery of goods; that it had been the uniform course of business of all express carriers to deliver all goods and parcels destined for that place to the station agent, who kept them in the baggage-room, notified the consignees of their arrival, and delivered them when called for at the station.

Endicott, J. It was the duty of the defendants, as common carriers of parcels, to deliver the trunk to the plaintiff personally or at his residence at West Mansfield, and until such delivery their liability as carriers continued. This liability they undertook to limit by proof of usage in their business to leave packages sent to

West Mansfield at the station, with notice to the consignee as a substitute for personal delivery. This was not a general usage of such a character, that a presumption of knowledge arises by mere force of existence, and which enters into and becomes part of the agreement of the parties. It was a particular usage, local in its application and character, and confined to this station, and, in order to bind the plaintiff, it must be proved that he knew it when he made the contract with the defendants to carry the trunk. The instructions on this point were sufficiently favorable to the defendants. Stevens *v.* Reeves, 9 Pick. 198; Berkshire Woolen Co. *v.* Proctor, 7 Cush. 417.

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Exceptions overruled.

WITBECK, Respondent, *v.* HOLLAND, Treasurer of the American Express Company, Appellant.

45 N. Y. 13. 1871.

Appeal from the judgment of the General Term of the Supreme Court in the fourth judicial district, affirming the judgment for the plaintiff, entered upon the report of the referee.

This action was tried before a referee, who found that the American Express Company was a joint stock association engaged in the general express business. That the plaintiff was a soldier on Hart's Island, N. Y., who, having received his bounty money on the 3d of December, 1864, took $320 of it to the office of the Adams Express Company, on that island, where it was counted, put in an envelope, sealed and addressed to "Martin Witbeck, Schenectady, N. Y.," delivered to the agent of the company who gave the plaintiff a receipt acknowledging the receipt of the package, "upon the special acceptance and agreement, that this company is to forward the same to its agent, nearest and most convenient to destination only, and there to deliver the same to other parties to complete the transportation, such delivery to terminate all liability of this company for such package," etc.

The package was delivered by the Adams Express Company on the 5th December, 1864, to the American Express Company at its office in New York, and a receipt was given to the Adams Express Company as follows: —

Received, New York, December 5, 1864, of Adams Express Company (per [illegible]), in good order, the following articles set opposite their respective names.

ARTICLES.	Dollars	Cents.	Consignee.	Where from.	Destination.	Amount charged	By what received
Pkg.	$320		Martin Witbeck	H. I.	Schenectady N. Y.	$1 —	Adams

Myers was the agent of the American Express Company at New York. The plaintiff, December 8, 1864, enclosed the receipt in a letter to his brother, Daniel Witbeck, who resided at Schenectady, which letter and receipt were received by Daniel Witbeck as an advertised letter about the middle of February, 1865.

There was at the time no contract or business connection between the Adams Express Company and the American Express Company, except that they took parcels, goods, etc., for each other for transportation and delivery along their respective routes of business. The American Express Company delivered the package to its local agent at Schenectady, December 6, 1864. Martin Witbeck, the consignee of said package, resided with his wife at Schenectady, at the time of the arrival of the package at Schenectady, and until after January 14, following.

The agent of the American Express Company did not know Martin Witbeck, and, when the package arrived, looked at the directory and did not find his name in it. The next day the agent filled up a notice and addressed it to Martin Whitbeck, Schenectady, and deposited it in the post-office. Between one and three days thereafter, the agent inquired of two men, conductors upon the N. Y. Central Railroad, running from Schenectady to Troy, and also inquired of John Brandt, the city treasurer of Schenectady, whether he knew Martin Whitbeck, and they replied they did not.

The agent made no further effort to find the consignee, and the package was deposited in the company's iron safe in its office till January 17, 1865, when the office was burglariously opened in the night, the safe blown open, the package abstracted and stolen, and has never been recovered.

The notice put in the post-office was not received by Martin Witbeck, though inquiries were made several times at the post-office while it was there, by his wife and father, for letters for themselves and for him.

The referee decided, among other things, that the American Express Company was bound to deliver the package to Martin Witbeck, personally, or at his residence or place of business; that the American Express Company did not make due effort to find Martin Witbeck, or his residence or place of business; that the plaintiff was entitled to judgment for $320, with interest from December 7, 1864.

From the judgment entered upon the report the defendant appealed to the General Term, where it was affirmed, and from such judgment of affirmance this appeal was taken.

Grover, J. The facts found by the referee showed, beyond question, that the defendant was a common carrier, and responsible, as such, for property delivered to it for transportation. This finding was warranted by the evidence. It was engaged in transacting a general express business. It is insisted by the counsel for the

defendant that its liability was restricted by the contract, proved by the receipt given by the Adams Express Company to the plaintiff, upon the receipt of the money from him by it at Hart's Island. From this receipt, it appears that the latter company undertook to forward the package to its agent nearest to its destination, there to deliver it to other parties to complete the transportation, such delivery to terminate all liability of that company for its passage. There is nothing in this or any other restriction at all affecting the liability of the defendant as a common carrier; all the restrictions found in the receipt are by the language limited to the liability of the Adams Company. Indeed, were they applicable to the defendant, they would not affect the liability of defendant in the action, as they do not include the cause of the loss, unless they relieve the carrier from the duty of delivery to the consignee. The first inquiry is, whether it was the duty of the carrier so to deliver the package in the absence of any restriction. Carriers by land are bound to deliver or tender the goods to the consignee at his residence or place of business, and until this is done they are not relieved from responsibility as carriers. 2 Kent's Com. 605; Angell on Carriers, § 259; Gibson *v.* Culver, 17 Wend. 305; Fisk *v.* Newton, 1 Den. 45. But when goods are safely conveyed to the place of destination, and the consignee cannot, after reasonable effort, be found, the carrier may discharge himself from further responsibility by depositing the property in a suitable place for the owner. Fisk *v.* Newton, *supra*. Carriers by vessels, boats, and railways are exempt from duty of personal delivery. Redfield on Railways, § 127; Thomas *v.* Boston R. R. Co. 10 Metcalf, 472. Such carriers discharge themselves from responsibility, as such, by transporting the goods to their nearest business station to the residence or place of business of the consignee, and notifying the consignee of their readiness to deliver the goods at such station, after the lapse of a reasonable time for him to receive them. But this exemption does not extend to express companies, although availing themselves of carriage by rail. Redfield on Railways, § 127. These were established for the purpose of extending to the public the advantages of personal delivery enjoyed in all cases of land carriage prior to the introduction of transportation by rail.

It appeared in the present case that the defendant had its vehicles by which they carried articles to the consignee in the city of Schenectady, which had arrived there by rail under contracts with the company for the transportation. This is the usual course of transacting business by such companies; were it otherwise, the business done by these companies would be greatly diminished, as it would be equally advantageous in many cases to have the property transported by the railroad company. When the defendant received the package from the Adams Company at New York, consigned to Martin Wilcox, Schenectady, it became liable as carrier for its

carriage to Schenectady and its delivery to Witbeck there, if with reasonable diligence he could be found. The performance of this entire service was contracted for by its receipt so addressed, and had the defendant received it from the plaintiff at New York and given him a receipt for its transportation, the obligation to make personal delivery at Schenectady would have been incurred. The only remaining question arises upon the exception taken to the finding by the referee, as a fact, that the defendant did not make due effort, nor use due diligence to find said Martin Witbeck, the consignee of said package. It is insisted by the counsel for the appellant, that the question, what is reasonable diligence, is one of law. That may be so, when there is no conflict in the evidence, or controversy as to the facts to be inferred therefrom. But that is not this case, nor will most cases of this class be of that description. In most, if not all, the question will be mixed, both of fact and law. In the present case the finding of the referee is clearly correct. The diligence, which the law required of the defendant, was such as a prudent man would have used in an important business affair of his own. The evidence shows that the defendant was so inattentive as to mistake the surname of the consignee. Although the package was addressed to Witbeck, all its inquiries were made for Whitbeck. This may have prevented their finding him. It further appeared that its inquiries were confined to a few persons in the vicinity of its place of business, and that by these it obtained information of other persons of a like surname, one of whom was the father of the consignee. Surely inquiry should have been made of these persons, and had it been so made, delivery would have been made and the loss would never have occurred. There is nothing in the point that the negligence of the plaintiff in not giving further information as to the residence of the consignee contributed to the loss. The defendant accepted the package, addressed as it was, and failed in the performance of the duty imposed thereby. For such failure it is responsible, irrespective of the right of the plaintiff to give additional information. I have examined the various exceptions taken by the appellant to the rulings of the referee as to the competency of evidence. The question whether the consignee was well known in Schenectady was proper. The plaintiff had the right to prove this fact if he could. But the testimony given in answer was not material. None of the testimony excepted to could have prejudiced the defendant. The judgment appealed from must be affirmed.

All the judges concurring, judgment affirmed.

NORWAY PLAINS CO. *v.* BOSTON AND MAINE R. R.

1 Gray (Mass.) 263. 1854.

Action of contract upon the agreement of the defendants to transport certain goods from Rochester, N. H., to Boston.

Shaw, C. J. The liability of carriers of goods by railroads, the grounds and precise extent and limits of their responsibility, are coming to be subjects of great interest and importance to the community. It is a new mode of transportation, in some respects like the transportation by ships, lighters, and canal-boats on water, and in others like that by wagons on land; but in some respects it differs from both. Though the practice is new, the law, by which the rights and obligations of owners, consignees, and of the carriers themselves are to be governed, is old and well established. It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it. These general principles of equity and policy are rendered precise, specific, and adapted to practical use, by usage, which is the proof of their general fitness and common convenience, but still more by judicial exposition; so that when, in a course of judicial proceeding, by tribunals of the highest authority, the general rule has been modified, limited, and applied, according to particular cases, such judicial exposition, when well settled and acquiesced in, becomes itself a precedent, and forms a rule of law for future cases, under like circumstances. The effect of this expansive and comprehensive character of the common law is, that whilst it has its foundations in the principles of equity, natural justice, and that general convenience which is public policy; although these general considerations would be too vague and uncertain for practical purposes, in the various and complicated cases, of daily occurrence, in the business of an active community, — yet the rules of the common law, so far as cases have arisen and practices actually grown up, are rendered, in a good degree, precise and certain, for practical purposes, by usage and judicial precedent. Another consequence of this expansive character of the common law is, that when new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, they must be

governed by the general principle, applicable to cases most nearly analogous, but modified and adapted to new circumstances by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances. The consequence of this state of the law is that when a new practice or new course of business arises, the rights and duties of parties are not without a law to govern them; the general considerations of reason, justice, and policy, which underlie the particular rules of the common law, will still apply, modified and adapted, by the same considerations, to the new circumstances. If these are such as give rise to controversy and litigation, they soon, like previous cases, come to be settled by judicial exposition, and the principles thus settled soon come to have the effect of precise and practical rules. Therefore, although steamboats and railroads are but of yesterday, yet the principles which govern the rights and duties of carriers of passengers, and also those which regulate the rights and duties of carriers of goods, and of the owners of goods carried, have a deep and established foundation in the common law, subject only to such modifications as new circumstances may render necessary and mutually beneficial.

The present is an action brought to recover the value of two parcels of merchandise, forwarded by the plaintiffs to Boston, in the cars of the defendants. These goods were described in two receipts of the defendants, dated at Rochester, N. H., the one October 31st, 1850, and the other November 2d, 1850.

By the facts agreed it appears that the goods specified in the first receipt were delivered at Rochester, and received into the cars, and arrived in Boston seasonably on Saturday, the 2d of November, and were then taken from the cars, and placed in the depot or warehouse of the defendants; that no special notice of their arrival was given to the plaintiffs or their agent; but that the fact was known to Ames, a truckman, who was their authorized agent, employed to receive and remove the goods, that they were ready for delivery, at least as early as Monday morning, the 4th of November, and that he might then have received them.

The goods specified in the other receipt were forwarded to Boston on Monday, the 4th of November; the cars arrived late; Ames, the truckman, knew from inspection of the waybill that the goods were on the train, and waited for them some time, but could not conveniently receive them that afternoon, in season to deliver them at the places to which they were directed, and for that reason did not take them; in the course of the afternoon they were taken from the cars and placed on the platform within the depot; at the usual time at that season of the year, the doors were closed. In the course of the night the depot accidentally took fire and was burnt down, and the goods were destroyed. The fire was not caused by lightning; nor was it attributable to any default, negligence, or want of due care on the part of the railroad corporation, or their agents or servants.

We understand the merchandise depot to be a warehouse, suitably enclosed and secured against the weather, thieves, and other like ordinary dangers, with suitable persons to attend it, with doors to be closed and locked during the night, like other warehouses, used for the storage of merchandise; that it is furnished with tracks, on which the loaded cars run directly into the depot to be unloaded; that there are platforms on the sides of the track, on which the goods are first placed; that if not immediately called for and taken by the consignees, they are separated according to their marks and directions, and placed by themselves in suitable situations within the depot, there to remain a reasonable and convenient time, without additional charge, until called for by parties entitled to receive them.

The question is whether, under these circumstances, the defendants are liable.

That railroad companies are authorized by law to make roads as public highways, to lay down tracks, place cars upon them, and carry goods for hire, are circumstances which bring them within all the rules of the common law, and make them eminently common carriers. Their iron roads, though built, in the first instance, by individual capital, are yet regarded as public roads, required by common convenience and necessity, and their allowance by public authority can be only justified on that ground. The general principle has been uniformly so decided in England and in this country; and the point is, to ascertain the precise limits of their liability. This was done to a certain extent in this court, in a recent case, with which, as far as it goes, we are entirely satisfied. Thomas *v.* Boston & Providence Railroad, 10 Met. 472.

Being liable as common carriers, the rule of the common law attaches to them, that they are liable for losses occurring from any accident which may befall the goods, during the transit, except those arising from the act of God or a public enemy. It is not necessary now to inquire into the weight of those considerations of reason and policy, on which the rule is founded, nor to consider what casualty may be held to result from an act of God, or a public enemy; because the present case does not turn on any such distinction. It is sufficient, therefore, to state and affirm the general rule. In the present case, the loss resulted from a fire, of which there is no ground to suggest that it was an act of God; and it is equally clear that it did not result from any default or negligence on the part of the company, though the goods remained in their custody. If, at the time of the loss, they were liable as common carriers, they must abide by the loss; because, as common carriers, they were bound as insurers to take the risk of fire, not caused by the act of God, and in such case no question of default or negligence can arise. Proof that it was from a cause for which they, neither by themselves nor their servants, were in any degree chargeable, could

amount to no defence, and would therefore be inadmissible in evidence. If, on the contrary, the transit was at an end, if the defendants had ceased to have possession of the goods as common carriers, and held them in another capacity, as warehousemen, then they were responsible only for the care and diligence which the law attaches to that relation; and this does not extend to a loss by accidental fire, not caused by the default or negligence of themselves, or of servants, agents, or others, for whom they are responsible.

The question then is, when and by what act the transit of the goods terminated. It was contended, in the present case, that, in the absence of express proof of contract or usage to the contrary, the carrier of goods by land is bound to deliver them to the consignee, and that his obligation as carrier does not cease till such delivery.

This rule applies, and may very properly apply, to the case of goods transported by wagon and other vehicles, traversing the common highways and streets, and which therefore can deliver the goods at the houses of the respective consignees. But it cannot apply to railroads, whose line of movement and point of termination are locally fixed. The nature of the transportation, though on land, is much more like that by sea, in this respect, that from the very nature of the case, the merchandise can only be transported along one line, and delivered at its termination, or at some fixed place by its side, at some intermediate point. The rule in regard to ships is very exactly stated in the opinion of Buller, J., in Hyde *v.* Trent & Mersey Navigation, 5 T. R. 397. "A ship trading from one port to another has not the means of carrying the goods on land; and, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier."

Another peculiarity of transportation by railroad is that the car cannot leave the track, or line of rails, on which it moves; a freight train moves with rapidity, and makes very frequent journeys, and a loaded car, whilst it stands on the track, necessarily prevents other trains from passing or coming to the same place; of course, it is essential to the accommodation and convenience of all persons interested, that a loaded car, on its arrival at its destination, should be unloaded, and that all the goods carried on it, to whomsoever they may belong, or whatever may be their destination, should be discharged as soon and as rapidly as it can be done with safety. The car may then pass on to give place to others, to be discharged in like manner. From this necessary condition of the business, and from the practice of these transportation companies to have platforms on which to place goods from the cars, in the first instance, and warehouse accommodation by which they may be securely stored, the goods of each consignment by themselves, in accessible places, ready to be delivered, the court are of opinion that the duty assumed by the railroad corporation is — and this, being known to owners of

goods forwarded, must, in the absence of proof to the contrary, be presumed to be assented to by them, so as to constitute the implied contract between them — that they will carry the goods safely to the place of destination, and there discharge them on the platform, and then and there deliver them to the consignee or party entitled to receive them, if he is there ready to take them forthwith; or if the consignee is not there ready to take them, then to place them securely and keep them safely a reasonable time, ready to be delivered when called for. This, it appears to us, is the spirit and legal effect of the public duty of the carriers, and of the contract between the parties when not altered or modified by special agreement, the effect and operation of which need not here be considered.

This we consider to be one entire contract for hire; and although there is no separate charge for storage, yet the freight to be paid, fixed by the company as a compensation for the whole service, is paid as well for the temporary storage as for the carriage. This renders both the services, as well the absolute undertaking for the carriage, as the contingent undertaking for the storage, to be services undertaken to be done for hire and reward. From this view of the duty and implied contract of the carriers by railroad, we think there result two distinct liabilities: first, that of common carriers, and afterwards that of keepers for hire, or warehouse keepers; the obligations of each of which are regulated by law.

We may then say, in the case of goods transported by railroad, either that it is not the duty of the company as common carriers, to deliver the goods to the consignee, which is more strictly conformable to the truth of the facts; or, in analogy to the old rule that delivery is necessary, it may be said that delivery by themselves as common carriers, to themselves as keepers for hire, conformably to the agreement of both parties, is a delivery which discharges their responsibility as common carriers. If they are chargeable after the goods have been landed and stored, the liability is one of a very different character, — one which binds them only to stand to losses occasioned by their fault or negligence. Indeed, the same doctrine is distinctly laid down in Thomas *v.* Boston & Providence Railroad, 10 Met. 472, with the same limitation. The point that the same company, under one and the same contract, may be subject to distinct duties, for a failure in which they may be liable to different degrees of responsibility, will result from a comparison of the two cases of Garside *v.* Trent & Mersey Navigation, 4 T. R. 581, and Hyde *v.* Trent & Mersey Navigation, 5 T. R. 389 [260]. See also Van Santvoord *v.* St. John, 6 Hill, 157, and McHenry *v.* Philadelphia, Wilmington & Baltimore Railroad, 4 Harring. 448.

The company, having received an adequate compensation for the entire service, if they store the goods, are paid for that service; they are depositaries for hire, and of course responsible for the security and fitness of the place, and all precautions necessary to

the safety of the goods, and for ordinary care and attention of their servants and agents, in keeping and delivering them when called for. This enforces the liability of common carriers to the extent to which it has been uniformly carried by the common law, so far as the reason and principle of the rule rendered it fit and applicable, that is, during the transit; and affords a reasonable security to the owner of goods for their safety, until actually taken into his own custody.

The principle, thus adopted, is not new; many cases might be cited; one or two will be sufficient. Where a consignee of goods, sent by a common carrier to London, had no warehouse of his own, but was accustomed to leave the goods in the wagon office, or warehouse of the common carrier, it was held, that the transit was at an end, when the goods were received and placed in the warehouse. Row *v.* Pickford, 8 Taunt. 83. Though this was a case of stoppage *in transitu*, it decides the principle. But another case in the same volume is more in point. *In re* Webb, 8 Taunt. 443. Common carriers agreed to carry wool from London to Frome, under a stipulation that when the consignees had not room in their own store to receive it, the carriers, without additional charge, would retain it in their own warehouse, until the consignor was ready to receive it. Wool thus carried, and placed in the carriers' warehouse, was destroyed by an accidental fire; it was held that the carriers were not liable. The court say that this was a loss which would fall on them, as carriers, if they were acting in that character, but would not fall on them as warehousemen.

This view of the law, applicable to railroad companies, as common carriers of merchandise, affords a plain, precise, and practical rule of duty, of easy application, well adapted to the security of all persons interested; it determines that they are responsible as common carriers until the goods are removed from the cars and placed on the platform; that if, on account of their arrival in the night, or at any other time, when, by the usage and course of business, the doors of the merchandise depot or warehouse are closed, or for any other cause, they cannot then be delivered; or if, for any reason, the consignee is not there ready to receive them,— it is the duty of the company to store them and preserve them safely, under the charge of competent and careful servants, ready to be delivered, and actually deliver them when duly called for by parties authorized and entitled to receive them; and for the performance of these duties after the goods are delivered from the cars, the company are liable, as warehousemen, or keepers of goods for hire.

It was argued in the present case, that the railroad company are responsible as common carriers of goods, until they have given notice to consignees of the arrival of goods. The court are strongly inclined to the opinion, that in regard to the transportation of goods by railroad, as the business is generally conducted in this country,

this rule does not apply. The immediate and safe storage of the goods on arrival, in warehouses provided by the railroad company, and without additional expense, seems to be a substitute better adapted to the convenience of both parties. The arrivals of goods, at the larger places to which goods are thus sent, are so numerous, frequent, and various in kind, that it would be nearly impossible to send special notice to each consignee of each parcel of goods or single article forwarded by the trains. We doubt whether this is conformable to usage; but perhaps we have not facts enough disclosed in this case to warrant an opinion on that question. As far as the facts on this point do appear, it would seem probable that persons frequently forwarding goods have a general agent who is permitted to inspect the way-bills, ascertain what goods are received for his employers, and take them as soon as convenient after their arrival. It also seems to be the practice for persons forwarding goods to give notice by letter and enclose the railroad receipt, in the nature of a bill of lading, to a consignee or agent, to warn him to be ready to receive them. From the two specimens of the form of receipt given by these companies, produced in the present case, we should doubt whether the name of any consignee or agent is usually specified in the receipt and on the way-bill. The course seems to be to specify the marks and numbers, so that the goods may be identified by inspection and comparison with the way-bill. If it is not usual to specify the name of a consignee in the way-bill, as well as on the receipt, it would be impossible for the corporation to give notice of the arrival of each article and parcel of goods. In the two receipts produced in this case, which are printed forms, a blank is left for the name of a consignee, but it is not filled, and no consignee in either case is named. The legal effect of such a receipt and promise to deliver no doubt is to deliver to the consignor or his order. If this is the usual or frequent course, it is manifest that it would be impossible to give notice to any consignee; the consignor is *prima facie* the party to receive, and he has all the notice he can have. But we have thought it unnecessary to give a more decisive opinion on this point, for the reason, already apparent, that in these receipts no consignee was named; and for another, equally conclusive, that Amos, the plaintiffs' authorized agent, had actual notice of the arrival of both parcels of goods.

In applying these rules to the present case it is manifest that the defendants are not liable for the loss of the goods. Those which were forwarded on Saturday arrived in the course of that day, lay there on Sunday and Monday, and were destroyed in the night between Monday and Tuesday. But the length of time makes no difference. The goods forwarded on Monday were unladen from the cars, and placed in the depot, before the fire. Several circumstances are stated in the case, as to the agent's calling for them, waiting, and at last leaving the depot before they were ready. But

we consider them all immaterial. The argument strongly urged was, that the responsibility of common carriers remained until the agent of the consignee had an opportunity to take them and remove them. But we think the rule is otherwise. It is stated, as a circumstance, that the train arrived that day at a later hour than usual. This we think immaterial; the corporation do not stipulate that the goods shall arrive at any particular time. Further, from the very necessity of the case and the exigencies of the railroad, the corporation must often avail themselves of the night, when the road is less occupied, for passenger cars; so that goods may arrive and be unladen at an unsuitable hour of the night to have the depot open for the delivery of the goods. We think, therefore, that it would be alike contrary to the contract of the parties and the nature of the carriers' duty, to hold that they shall be responsible as common carriers, until the owner has practically an opportunity to come with his wagon and take the goods; and it would greatly mar the simplicity and efficacy of the rule, that delivery from the cars into the depot terminates the transit. If, therefore, for any cause, the consignee is not at the place to receive his goods from the car as unladen, and in consequence of this they are placed in the depot, the transit ceases. In point of fact, the agent might have received the second parcel of goods in the course of the afternoon on Monday, but not early enough to be carried to the warehouses at which he was to deliver them; that is, not early enough to suit his convenience. But, for the reasons stated, we have thought this circumstance immaterial, and do not place our decision for the defendants, in regard to this second parcel, on that ground.

Judgment for the defendants.

THE L. L. & G. RAILROAD CO. *v.* MARIS.

16 Kan. 333. 1876.

The opinion contains a full statement of the facts and questions in this case. Maris, as plaintiff, recovered judgment at the April Term, 1874, of the District Court against the Railroad Company, for $208.25 and costs, and the Railroad Company brings the case here on error.

Brewer, J. This was an action brought by defendant in error to recover for goods destroyed by fire in a depot belonging to the plaintiff in error, and the question is, whether the company at the time of the fire occupied toward the goods the position of carrier, or that of warehouseman. The case was tried upon an agreed statement of facts. It is not contended that the fire was caused by the negli-

gence of the company, or that if its liability as carrier had terminated, it was responsible for the loss. The material facts are these: Maris was a merchant at Winfield, a place about ninety miles west of Independence, a point on the company's road. Goods were shipped to him over the company's road, to be delivered to him at Independence. The goods in question reached Independence on the 4th and 7th days of January, 1872, and were placed in the depot building, and there remained eight days (until the 15th of January), and were then consumed by fire. Immediately after the arrival of each consignment of goods at Independence, notice thereof was forwarded by mail to Maris at Winfield, but did not reach him until the 20th of January, and after the fire. A tri-weekly mail ran between the two places. Ordinarily, only two days were occupied in transmitting the mail. During that month the epizooty was prevailing among the horses in that section of the country, and, owing to that or some other cause over which neither party had any control, the notice did not reach Maris until the 20th. He called every day at the post-office in Winfield for his mail. The only means of conveying goods from Independence to Winfield was by wagon, and under favorable circumstances the trip from Winfield to Independence took from three to five days, and the round trip six to ten days. By special agreement between the parties, notice was to be given Maris by mail of the arrival of the goods at Independence. The form of the notice given (and Maris had, prior to the 1st of January, 1872, received similar notices of the arrival of other goods) was as follows:—

FREIGHT OFFICE, L. L. & G. R. R. LINE,
INDEPENDENCE, ———, 187—.

M————:

There this day arrived at our depot at ————, consigned to you, the following articles:

No.	*Articles.*	*No.*	*Articles.*

EXHIBIT A.

Weight, ——— *Charge*, $———

which are ready for delivery to you on payment of freight and charges.

N. B.—No goods delivered until all charges thereon are paid. Storage will be charged in all cases where goods are not removed within the prescribed time.

The contract of this company as common carriers ends upon the arrival of goods at our depots, and the company will not be responsible for damage from ordinary leakage, breakage, or insufficient cooperage; and no claim for damages will be allowed after the goods have left the depot, unless by consent of the agent.

Goods will be delivered only to the owner, or his written order. A receipt for goods will, in all cases, be required, and no claim will be entertained for goods lost after such receipt has been taken.

———— *Agent.*

Upon these facts some questions of importance are presented. It is insisted on behalf of the company, in the first place, "that a com-

mon carrier is relieved of its extraordinary liability as an insurer whenever it has carried the goods intrusted to its safety, and deposited them in a safe warehouse." This question as to the period at which the carrier's extraordinary liability terminates, comes to us borne upon two opposing lines of decision. At the head of one line stands the case of the Norway Plains Company *v.* B. & M. Rld. Co., 1 Gray, 263, in which the great jurist of Massachusetts, C. J. Shaw, holds that this liability of the carrier terminates when the goods are unloaded at their place of destination, and are ready for removal by the consignee; that if the latter be not present to receive them, and they are kept by the company in its depot or warehouse, its liability is that of a warehouseman. In other words, this liability continues only during the actual transit, and that when this is ended, if the consignee does not immediately receive them, the company, as carrier, delivers them to the company as warehouseman, and thereafter the company is liable only for loss resulting from actual negligence. At the head of the other line is the case of Moses *v.* B. & M. Rly. Co., 32 New Hamp., 523, in which the court decides that the carrier's liability continues after the termination of the actual transit, and until the consignee has a reasonable time to remove the goods; that, as the carrier's liability commences, not with the actual transit of goods, but from the time of receipt from consignor, so it continues until actual delivery to the consignee, or, what is equivalent to a delivery, until the consignee has had reasonable time after their arrival to inspect and take them away in the common course of business. The mere fact that either before or after the actual transit they are placed by the company in its depot or warehouse does not change the character of its liability. The following cases support the Massachusetts doctrine: McCarty *v.* N. Y. & Erie Rld. Co., 30 Penn. St. 253; Francis *v.* Dubuque & S. C. Rld. Co., 25 Iowa, 60; Bauserman *v.* T. W. & W. Rly. Co., 25 Ind. 434; C. & C. Air Line Rld. Co. *v.* McCool, 26 Ind. 140; C. & A. Rld. Co. *v.* Scott, 42 Ill. 133. The other doctrine is adopted in the following cases: Fenner *v.* B. & St. L. Rld. Co., 44 N. Y. 505; Zum *v.* New Jersey St. Co., 49 N. Y. 442; Wood *v.* Crocker, 18 Wis. 345; Derosia *v.* St. P. & W. Rld. Co., 18 Minn. 133; Morris & Essex Rld. Co. *v.* Ayres, 5 Dutch. 393; Blumenthall *v.* Brainard, 38 Vt. 413; McMillan *v.* M. S. & N. J. Rld. Co., 16 Mich. 79; Jeffersonville Rld. Co. *v.* Cleveland, 2 Bush, 468; Hilliard *v.* Wilmington & C. Rld. Co., 6 Jones (Law), 343. The question is a new one in this State, and one of no small importance both to carriers and shippers. Notwithstanding there is a technical precision in the Massachusetts doctrine which makes it both capable of exact statement and easy of application, we think the other doctrine more just and reasonable in its application to the ordinary transactions of business, protecting both the shipper and the carrier. It extends a little the duration of the carrier's obligation, but only so far as it seems necessary to protect the shipper.

The goods remain in the custody of the carrier, and subject to his control. The exact moment of arrival can seldom be known to the consignee, even if he have notice of the shipment. It is unreasonable to compel him to remain at the depot of the carrier, waiting the arrival of the goods, or assume all the risks of the uncertainties in the delay of transportation and time of arrival. We therefore hold that the carrier's liability continues until the consignee has had a reasonable time to call for, examine, and remove the goods.

What is a reasonable time? This is not a time varying with the distance, convenience, or necessities of the consignee, but it is such time as will enable one living in the vicinity of the place of delivery, in the ordinary course of business, and in the usual hours of business, to inspect and remove the goods. It is well said by the court in the case from 18 Minn. 133, that, "What would be, under the circumstances of the case, such reasonable time for the removal of the goods, is not to be measured by any peculiar circumstances in the condition or situation of the consignee, or plaintiff, which render it necessary for his convenience or accommodation that he should have longer time or better opportunity than if he resided in the vicinity of the depot, and was prepared with means and facilities of removing them; but what is meant by reasonable time is such as would give a person residing in the vicinity of the place of delivery, informed of the usual course of business on the part of the company, a suitable opportunity, within the usual business hours, after the goods are ready for delivery, to come to the place of delivery, inspect the goods, and take them away." Tried by this rule, it is plain that the goods had remained in the depot at Independence more than a reasonable time for their inspection and removal. They should have been removed on the day of their arrival, or, at the furtherest, during the business hours of the succeeding day.

It is insisted, however, that notice was required of their arrival, and that no notice was received until after the destruction. Whether, independent of the special contract, any notice was requisite may be doubted. The consignee did not live at or near the place of delivery, and the authorities are conflicting upon the question whether notice is requisite even when the consignee lives at the place of delivery. See upon the question of notice, McDonald *v.* W. Rld. Co., 34 N. Y. 497; Fenner *v.* Buffalo & St. L. Rld. Co., 44 N. Y. 505; Price *v.* Powell, 3 N. Y. 322; C. & A. Rld. Co. *v.* Scott, 42 Ill. 133; Derosia *v.* St. P. & W. Rld. Co., 18 Minn. 133; McMillan *v.* M. S. & N. J. Rld. Co., 16 Mich. 79; Hilliard *v.* W. & C. Rld. Co., 6 Jones (Law), 343. But whether notice independent of any special contract would have been requisite, need not be determined, for here the parties had stipulated for notice. And the question is, what effect did this notice have upon the company's liability? On the one hand, it is claimed that the reasonable time in which to remove the goods dates from the receipt of the notice

instead of the arrival of the goods; on the other, that the notice was purely a favor to the consignee, and that specifying the time at which the carrier's liability was to cease, it cannot be construed as enlarging that time. The question is one of difficulty. In those States where notice of the arrival of the goods is required to terminate the carrier's liability, it is held that the reasonable time for removal dates from the giving of the notice. This seems necessary to make the notice of any value, for if the reasonable time commences with the arrival of the goods it might often expire before the receipt of notice. It would almost invariably so expire if the consignee lived elsewhere than at the place of delivery. Hence, the notice would be meaningless, as affecting the rights and liabilities of either party. On the other hand, the form of notice used by the company, and of which Maris had information by the receipt of such notices, attempts to limit the effect thereof, and plainly states that the company's liability as carrier is to terminate upon the arrival of the goods. Hence, Maris had knowledge that while the company had agreed to give and would give notice of the arrival, it did so only as a favor to him, and without extending the duration of its extraordinary liability. If Maris was unwilling to continue the shipment of goods under such conditions, he was at liberty to stop. Continuing, he accepts the conditions. To this he replied that, contracting for notice without any stipulation as to the forms and conditions of notice carries with it all the rights which flow from the mere fact of notice, and that the company cannot thereafter limit those rights by attaching conditions to that notice. This would doubtless be a satisfactory reply if this were the first consignment and the first notice. But having received notices with similar conditions, and making no objection thereto, or seeking a new arrangement, it seems to us that he cannot insist upon rights other than those given by the form of notice actually used. It must be borne in mind that this is not an attempt by the company to restrict its liability, but an attempt by special contract to enlarge it; and before the company could be bound by such special contract it should be made clear that it had assented to it in full, as claimed. It is not pretended that the company had ever given any notice otherwise than with the conditions attached to this; nor is it claimed the company would not be liable for any injuries resulting from its own negligence; so that its interpretation of its contract for notice — an interpretation accepted by Maris without objection — was that of an agreement to give information of the arrival of the goods without, in the mean time, assuming any additional liability. We are aware that the agreed statement shows that the first notice was only received Dec. 23d, 1871, and that, owing to the sickness of one party employed, as well as the prevalence of the epizooty, Maris failed to get a team to Independence before the destruction of all the goods of the various consignments by fire on January

15th, 1872. But we fail to see anything which shows that Maris was unable to communicate by mail with the company, or to go himself, or send some one to Independence to make a new arrangement, or stop the shipment, or receive and store the goods. Under these facts, though with some doubts, we are constrained to hold that the company's liability as carrier had terminated before the fire, and that therefore it was not responsible for the destruction of the goods.

The case having been tried upon an agreed statement of facts, the judgment will be reversed, and the case remanded with instructions to enter judgment in favor of the plaintiff in error, defendant below.

FAULKNER *v.* HART.

82 N. Y. 413. 1880.

Appeal from judgment of the General Term of the Superior Court of the city of New York, in favor of defendants, entered upon a case submitted under 1279 of the Code of Civil Procedure. (Reported below, 12 J. & S. 471.)

The question submitted was as to the liability of defendants, common carriers, for the loss of certain goods.

Miller, J. The goods, for the value of which the plaintiffs claim to recover in this action, were shipped at New York, to be transported to and were consigned to them at Boston; and they were called for on the day of their arrival, but a delivery was refused until the next day, because it was not convenient for the defendant to deliver them. They were unloaded from the cars the same afternoon, but too late for delivery, and were placed during the night of that day in the defendant's warehouse, and before the plaintiffs had an opportunity to make another demand the warehouse, together with the goods, was destroyed by fire. The plaintiffs were doing business both in New York and Boston, and all resided in Boston except one of them, who lived in New Jersey. The contract for transportation of the goods was made in New York, with the Norwich and New York Transportation Company, in behalf of itself and the connecting carriers to Boston, and they were to be conveyed to Boston. The last part of the route they were placed in cars upon the road, operated by the defendants.

The rule as to the liability of carriers under the facts stated is well established by the law merchant, and the authorities are numerous which sustain the position that the carrier is bound to pay for the loss of the goods destroyed. It is his duty not only to transport the goods, but he has not performed his entire contract as a com-

mon carrier until he has delivered the goods, or offered to deliver them to the consignee, or has done what is equivalent, by giving to the consignee, if he can be found, due notice after their arrival, and by furnishing him a reasonable time thereafter to take charge of or to remove the same. Gatliffe *v.* Bourne, 4 Bing. N. C. 314; s. c., 11 Clarke & Fin. 45; Price *v.* Powell, 3 Comst. 322; Zinn *v.* N. J. St. Co., 49 N. Y. 442; Sherman *v.* Hudson River R. R. Co., 64 id. 254; The Sultana *v.* Chapman, 5 Wis. 454; Sleade *v.* Payne, 14 La. Ann. 453; Graves *v.* H. & N. Y. St. Co., 38 Conn. 143; C. & R. I. R. R. *v.* Warren, 16 Ill. 502; Moses *v.* B. & M. R. R., 32 N. H. 523; The Tangier, 1 Clifford, 396.

In view of the rule laid down in the authorities cited, there would appear to be no serious question as to the plaintiffs' claim to recover for the value of the goods actually destroyed. The right of the plaintiffs to recover is resisted, and exemption for liability is claimed by reason of the decisions of the courts of the State of Massachusetts, holding adversely to the rule which is established at common law, and which, as we have seen, has been generally adopted and sustained in this country and in England. The decisions of that State established that the proprietors of a railroad, who transport goods for hire and deposit them in a warehouse until the owner or consignee has a reasonable time to take them away, are not liable as common carriers for their loss by fire without negligence or default on their part; that the railroad corporation ceases to be a common carrier, and becomes a warehouseman, as a matter of law, when it has completed the duty of transportation, and has assumed the position of a warehouseman, as a matter of fact, and according to the usages and necessities of the business in which it is engaged. Norway Plains Co. *v.* B. & M. R. R. Co., 1 Gray, 263 [**274**]; Rice *v.* Hart, 118 Mass. 201. These decisions are entitled to the highest respect; but, like all other adjudications, are the subject of revisal, limitation, and even to be overruled in the court in which they originated. The same right exists in other courts to consider and pass upon the same question; and how far they should be allowed to control their decisions in a cause of action where the contract was made in one State, and performed in part in another State where the law has been decided differently, is the question now to be determined. It was long since held in this State that we could not break in upon the settled principles of our commercial law to accommodate them to those of any country. Aymar *v.* Sheldon, 12 Wend. 439. This principle is well established in regard to all contracts of a commercial character; and so far as may be practicable, it is of no little importance that the rule should be harmonious and uniform. Contracts of this description have been the subject of frequent consideration in the Federal courts, and the decisions have been direct and clear, that while the decisions of local courts in reference to matters purely local in the

States are obligatory throughout the country, they are not conclusive and final as to questions of commercial law. In Swift *v.* Tyson, 16 Peters, 19, the court say: "The true interpretation and effect of contracts and other instruments of a commercial nature are to be sought, not in the decisions of local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules or conclusive authority by which our own judgments are to be bound up and governed." In a recent case, Oates *v.* Nat. Bank, 100 U. S. 239, the State court in Alabama held that by the rules of the commercial law, one who receives a promissory note as collateral security for a pre-existing debt does not become a purchaser for value in the course of business, so as to cut off equities which the maker may have against the payee; and on appeal it was held that the courts of the United States are not bound by the decisions of the State courts upon questions of commercial law. This principle has been repeatedly upheld in other cases. Meade *v.* Beale, Taney, 339, 360; Austen *v.* Miller, 5 McLean, 153; The Ship George, Olcott, 89; Pine Grove *v.* Talcott, 19 Wall. 666; Robinson *v.* Com. Ins. Co., 3 Sumn. 220. In Meade *v.* Beale (*supra*) it is said: "Where the State court does not decide a case upon the particular law of the State or established usage, but upon general principles of commercial law, if it falls into error, that erroneous decision is not regarded as conclusive."

From the authorities cited it follows that if the higher court in the State of Massachusetts has made an erroneous decision, wrong in principle and contrary to a well-settled rule of commercial law in the English courts, in the Supreme Court of the United States, and many of the State courts, and especially adverse to the decisions of this court, it should not be followed here; and it is not only the right, but the duty of this court to adhere to its own decisions.

Any other rule would lead to confusion in regard to a principle of general application; for if the doctrine of the Massachusetts Court is to prevail, the right of the aggrieved party might depend upon the fact whether the action was brought in the Federal or State court; and if the action in this case had been brought in the Circuit Court of the United States for the State of Massachusetts, the plaintiffs would be entitled to recover, while in the State court a different result would prevail. Richardson *v.* Goddard, 23 How. [U. S.] 38; The Tangier, 1 Clifford, 396; Moses *v.* B. & M. R. R., 32 N. H. 523. This court has the same authority to disregard the Massachusetts decisions, in a case involving a commercial question, as that court had to establish a rule adverse to the decisions of this court, as was done, virtually, in the cases cited. Nor is it important to determine whether, upon a reconsideration, any different rule would have

been adopted. It is sufficient to say that in reference to a law *not* of a single State, but affecting the commerce of the world, the decisions of the courts of such State are not obligatory upon the courts of other States or countries.

The learned counsel for the respondents argues that, as the delivery of the goods was to be made in Boston, where they were destroyed, the law of Massachusetts should control in respect to such delivery; and we are referred to several decisions which, it is claimed, sustain this doctrine. Barter *v.* Wheeler, 49 N. H. 9; Gray *v.* Jackson, 51 id. 9; Knowlton *v.* Erie Railway Co., 19 Ohio St. 260; M. & St. P. R. Co. *v.* Smith, 7 Chicago Leg. News, 174. While these cases uphold the general principle, that where the contract is to be performed partly in one country and partly in another country, each portion is to be interpreted according to the laws of the country where it is to be performed, — a rule which is fully sustained by authority (see Story on Cont., § 655; Pope *v.* Nickerson, 3 Story, 474, 485; Scudder *v.* Union Nat. Bank, 1 Otto, 413; Pomeroy *v.* Ainsworth, 22 Barb. 118), none of them hold that where a great principle of commercial law has been established, which is universally acknowledged and acquiesced in, that the law announced by the courts of a single State can overturn that principle and control the decisions of the courts of another and a distant State. No such question arose in any of the cases cited; and the answer to the position taken, that the decision of the local courts should control, is that such decisions are not, under the circumstances, a correct interpretation of the rule of law in such a case, and are not the accepted law of the land. It is erroneous and must fall, for the reason that it cannot be upheld, either upon principle or authority.

Nor are any of the authorities cited applicable to the case considered. As to those cited from the State of New Hampshire, it may be remarked that the precise question was presented in Moses *v.* B. & M. R. R. Co., 32 N. H. 523, where the goods were transported to Boston and burned before the consignee had an opportunity to remove them; and the authority of the Massachusetts cases was repudiated, and it was said that by the rule there laid down the salutary principles of the common law are sacrificed to considerations of convenience and expediency, in the simplicity and precise and practical character of the rule which it established. The case of Curtis *v.* D., L. & W. R. R. Co., 74 N. Y. 116, involved a question as to the effect of a local statute of Pennsylvania, limiting the defendant's liability, upon the law applicable to such a case in the State of New York. It was held that the *lex loci contractus* did not control, the place of delivery being a material and important part of the contract and in contemplation of the parties at the time. It was said that it was a reasonable inference that it was entered into with reference to the laws of the place where delivered. The case last cited did not involve any such question as is here presented, as there

was no conflict in reference to the decisions of the courts, and no question made as to any general rule of commercial law being involved, as is the case here.

If there had been a positive statute of the State of Massachusetts providing that the carrier's liability should cease when the goods had been deposited at the end of the route in a suitable warehouse, a different question would arise, and it might well be contended that, as the question arose under the statute of that State, the question of liability would depend upon the construction placed upon such statute by the court in Massachusetts, in accordance with the decisions of the court of this State and the Supreme Court of the United States. Jessup *v.* Carnegie, 80 N. Y. 441; Mills *v.* M. C. R. R. Co., 45 id. 626; Whitford *v.* Panama R. R. Co., 23 id. 465; Elmendorf *v.* Taylor, 10 Wheat. 152; Shelby *v.* Guy, 11 id. 367; Town of Ottawa *v.* Perkins, 94 U. S. 260; Fairfield *v.* County of Gallatin, MS. Op. U. S. Sup. Ct. But no such question arises in the case at bar. So, also, if the Massachusetts cases were decisive as to the law upon the question considered, it might well be urged that the plaintiff entered into the contract having them in view. But, as we have seen, they are not conclusive, and the real point is, what is the common-law rule? And the courts of Massachusetts having decided one way, and the courts of the United States and of this State, as well as those of other States and countries, differently, it is open, in a case arising in the courts of this State, to determine the true rule. It is the same subject, and involves the precise point, whether the common law shall prevail, and whether the decision of the State court is erroneous. The question is not as to the application of a local statute or a local law, but one of a comprehensive character, affecting a general rule applicable to all contracts of the nature of the one now involved.

The fact that the defendants were not carriers between New York and Boston, but only for a portion of the route, and that they made no contract directly with the plaintiffs, cannot affect the question as to the liability upon the contract made on their behalf for transportation over their portion of the route. As the original contract was made in New York for a through transportation, the connecting carrier was entitled to all the benefits of the contract, as well as to any special exemptions it contained. Maghee *v.* C. & A. R. R. Co., 45 N. Y. 514, 521; Lamb *v.* The Same, 46 id. 271. For the same reason they would be subject to all the obligations incurred thereby. The contract between the first carrier and the connecting carrier is deemed to have been made for the shipper's benefit, and is ratified by bringing the suit. Green *v.* Clark, 2 Kern. 343. And each of the connecting lines is responsible for injuries on its own line, except where there is an express contract for carriage beyond the terminus. Condict *v.* G. T. R. R. Co., 54 N. Y. 500; Root *v.* G. W. R. R. Co., 45 id. 524; Sherman *v.* H. R. R. R. Co., 64 id. 260.

The contract, being made in New York, is binding upon the plaintiffs, the shippers, and the defendants, the connecting carriers, so far as they undertook to perform it; and although their liability arose at the end of their route, yet it was under the contract as made in New York.

We are referred to a number of cases by the learned counsel for the respondents, to sustain the proposition that the general obligation created by the law of the place of delivery, in respect to the mode of delivery by a carrier, controls; and it is urged that when by the law of the place of delivery the carrier had a right to store the goods, the nature of the bailment is changed, and the carrier is relieved from the responsibility originally assumed, and the liability of a warehouseman is substituted. We do not deem it necessary to controvert the correctness of the rule laid down, where it does not interfere with the general principles and doctrines of commercial jurisprudence; but there is no case cited which holds that the court of another State, where an action is pending, may not adhere to its own rules and disregard the decision of a State which overrules a great principle. As we have seen, the United States Supreme Court have refused to sustain the decisions of the State court when violating a great principle; and the rule is a sound one which upholds the position that the decisions of the State court should not be followed to such an extent as to make a sacrifice of truth, justice, and law. Gelpcke *v.* Dubuque, 1 Wall. 175, 205; Olcott *v.* Supervisors, 16 id. 678. It is upon a principle of comity, that one State recognizes and admits the operation of the laws of another State within its own jurisdiction, where such law is not contrary to its own rules of policy, or to abstract right, or the promotion of justice and morality; but this principle should never be carried to the extent of holding that a suitor in its courts is debarred from the maintenance of his just rights according to its well-established decisions and laws, and the general principles of the common law which it has fully recognized and which are almost universally regarded and accepted, in reference to the question presented, wherever the common law prevails. No rule of comity demands any such sacrifice in the business intercourse between the people of the different States, and great injustice might follow by yielding to such a principle, and in sustaining a rule of law which was wrong in itself, hostile to the policy and law of the State where the contract was made, and adverse to the general current of authority elsewhere. King *v.* Sarria, 69 N. Y. 24.

In the consideration and determination of the case before us, it is worthy of notice that the contract made in New York, as the record shows, was, in effect, in conformity with the usual course of business, that the goods were to be delivered to the consignees. In Rice *v.* Hart, *supra*, the contract was merely to transport to Boston, and was silent as to delivery. It may, perhaps, be doubted whether the

agreement to deliver to the plaintiffs as consignees was satisfied by a delivery to the defendants, especially after a demand by the plaintiffs and a refusal to deliver to them.

If the shipper was entitled to the benefit of a contract to deliver the goods to the consignees without any restriction, it is not entirely clear that the rule laid down in the Massachusetts decisions is applicable. Without, however, expressing a decisive opinion upon the question last discussed, for the reasons already apparent, the rule adopted in the Massachusetts cases cannot be sustained. It should not be overlooked that the point presented does not involve solely a question as to a local law, but part of a system of general commercial law. That the court in Massachusetts had decided the law contrary to what it was is not controlling; for it may be assumed, even if the parties had knowledge of the decision, that they knew it was contrary to the current of authority in similar cases, and contracted, having in view the law as it actually existed. Like an unconstitutional law, void of itself, the decision was not the law, and is not to be regarded as authority for that reason.

The judgment should be reversed, and judgment should be rendered in favor of the plaintiffs for $6,156.95, with interest from November 7, 1872, with costs.[1]

OUIMIT *v.* HENSHAW.

35 Vt. 605. 1863.

Aldis, J. . . . . .

We think it is the true rule of the law as to baggage that has reached its final destination, that the railroad company must, upon its arrival, have it ready for delivery upon the platform at the usual place of delivery, until the owner can, in the use of due diligence, call for and receive it; and that the owner must call for it within a reasonable time, and must use diligence in calling for and removing it. If the owner does not within a reasonable time, and in the exercise of diligence, call for the baggage, then the company should put it in their baggage-room and keep it for him, and their custody of it then is only that of warehousemen; and they are discharged from liability as carriers as soon as they have kept it ready for delivery a reasonable time, and it has not been called for. Where trains arrive at such hours that it is the usual course of business at the station to immediately deliver the baggage, and for passengers to immediately receive it, there the reasonable time for which the company should have it ready for

[1] *Accord*, Lake Erie & W. R. Co. *v.* Heath (Ohio), 59 N. E. R. 1042.

delivery, must be limited and governed by the practice and custom of immediate delivery; and in such cases reasonable time and immediate delivery go hand in hand, and "reasonable time" cannot extend the delivery to another day or another occasion. We believe it to be the usual custom to deliver and receive baggage not only during what is called the business hours of the day, but upon the arrival of trains in the night, and at almost any hour of the night. The traveller is rarely willing, after arriving at his destination, to leave his baggage at a railroad depot, and the railroad companies are usually desirous to despatch business, and be relieved from their responsibility. Hence immediate delivery is the rule as to the baggage; and the rule that has been applied to the receipt of freight, that it should arrive during the usual hours of business, and so that the consignee may have an opportunity during the hours of business to see and receive it, does not apply to baggage, which usually accompanies the traveller, and is required by him on arrival.

The rule is thus expressed by Mr. Angell, in his work on the law of carriers, sec. 114: "The arrival with the baggage in safety at the place of destination will not discharge the carrier until its delivery to the owner; although, unless demanded in a reasonable time, the liability of the carrier, in his strict character of a common carrier, will not continue. No passenger is required, however, to expose his person in a crowd, or endanger his safety in the attempt to designate and claim his baggage."

In Pierce on Railroad Law, p. 499, it is said: "The liability of the company as a common carrier ceases when the passenger has had a reasonable opportunity after the arrival to receive his baggage; and if it remains in its custody after that, the company will be liable only as bailee for hire or gratuitously, according to circumstances."

Redfield on Railways, speaking of the liability of railroad companies for the baggage of travellers, says: "They remain liable until a full and unequivocal re-delivery to the owner, and ordinarily to the end of the route;" and in a note, citing Powell *v.* Myers, says: "If baggage be not called for in a reasonable time, the liability of the company as carrier ceases, and they are holden only for ordinary care as bailees for hire."

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B. Termination of Liability as Bailee.

a. *Delivery to Connecting Carrier.*

RAILROAD CO. *v.* MANUFACTURING CO.

16 Wall. (U. S.), 318. 1872.

In error to the Circuit Court for the District of Connecticut; the case being thus: —

In October, 1865, at Jackson, a station on the Michigan Central Railroad, about seventy-five miles west of Detroit, one Bostwick delivered to the agent of the Michigan Central Railroad Company, for transportation, a quantity of wool consigned to the Mineral Springs Manufacturing Company, at Stafford, Connecticut, and took a receipt for its carriage, on the back of which was a notice that all goods and merchandise are at the risk of the owners while in the warehouses of the company, unless the loss or injury to them should happen through the negligence of the agents of the company.

The receipt and notice were as follows: —

"Michigan Central Railroad Company,
"Jackson, October 11th, 1865.

"Received from V. M. Bostwick, as consignor, the articles marked, numbered, and weighing as follows: —

[Wool described.]

"To be transported over said railroad *to the depot* in Detroit, and there to be delivered to ———, agent, or order, upon the payment of charges thereon, *and subject to the rules and regulations established* by the company, a part of which notice is given on the back hereof. This receipt is not transferable.

"Hastings,
"*Freight Agent.*"

The notice on the back was thus: —

"The company will not be responsible *for damages occasioned by delays* from storms, accidents, *or other causes* . . . and all goods and merchandise will be at the risk of the owners thereof *while in the company's warehouses, except such loss or injury as may arise from the negligence of the agents of the company.*"

Verbal instructions were given by Bostwick that the wool should be sent from Detroit to Buffalo, by lake, in steamboats, which instructions were embodied in a bill of lading sent with the wool. Although there were several lines of transportation from Detroit eastward by which the wool could have been sent, there was only one transportation line propelled by steam on the lakes, and this line was, and had been for some time, unable, in their regular course of business, to receive and transport the freight which had accumulated

in large quantities at the railroad depot in Detroit. This accumulation of freight there, and the limited ability of the line of propellers to receive and transport it, were well known to the officers of the road, but neither the consignor, consignee, nor the station-master at Jackson were informed on this subject. The wool was carried over the road to the depot in Detroit, and remained there for a period of six days, when it was destroyed by an accidental fire, not the result of any negligence on the company's part. During all the time the wool was in the depot it was *ready to be delivered* for further transportation to the carrier upon the route indicated.

In consequence of the loss the manufacturing company sued the railroad company. The charter of the company, which was pleaded and offered in evidence, contained a section thus: —

"The said company may charge and collect a reasonable sum for storage upon all property which shall have been transported by them upon delivery thereof at any of their depots, and which shall have remained at any of their depots more than four days; *Provided*, that elsewhere than at their Detroit depot, the consignee shall have been notified if known, either personally or by notice left at his place of business or residence, or by notice sent by mail, of the receipt of such property at least four days before any storage shall be charged, and at the Detroit depot such notice shall be given twenty-four hours (Sunday excepted) before any storage shall be charged; but such storage may be charged after the expiration of said twenty-four hours upon goods not taken away; *Provided*, that in all cases the said company shall be responsible for goods on deposit in any of their depots *awaiting delivery*, delivery as warehousemen, and not as common carriers."

The controversy, of course, was as to the nature of the bailment when the fire took place. If the railroad company were to be considered as warehousemen at the time the wool was burned, they were not liable in the action, as the fire which caused its destruction was not the result of any negligence on their part. If, on the contrary, their duty as carriers had not ceased at the time of the accident, and there were no circumstances connected with the transaction which lessened the rigor of the rule applicable to that employment, they were responsible; carriers being substantially insurers of the property intrusted to their care.

The court was asked by the railroad company to charge the jury that its liability was the limited one of a warehouseman, importing only ordinary care. The court refused so to charge, and, on the contrary, charged that the railroad company were liable for the wool as common carriers, during its transportation from Jackson to Detroit, and after its arrival there, for such reasonable time as, according to their usual course of business, under the actual circumstances in which they held the wool, would enable them to deliver it to the next carrier in the line, but that the manufacturing com-

pany took the risk of the next carrier line not being ready and willing to take said wool, and submitted it to the jury to say whether under all the circumstances of the case in evidence before them such reasonable time had elapsed before the occurrence of the fire.

The jury, under the instructions of the court, found that the railroad company were chargeable as carriers, and this writ of error was prosecuted to reverse the decision.

Mr. Justice DAVIS. It is not necessary in the state of this record to go into the general subject of the duty of carriers in respect to goods in their custody which have arrived at their final destination. Different views have been entertained by different jurists of what the carrier is required to do when the transit is ended, in order to terminate his liability; but there is not this difference of opinion in relation to the rule which is applicable while the property is in progress of transportation from the place of its receipt to the place of its destination.

In such cases it is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line and deliver to the next carrier in the route beyond. This rule of liability is adopted generally by the courts in this country, although in England, at the present time, and in some of the States of the Union, the disposition is to treat the obligation of the carrier who first receives the goods as continuing throughout the entire route. It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country; but the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction. Public policy, however, requires that the rule should be enforced, and will not allow the carrier to escape responsibility on storing the goods at the end of his route, without delivery or an attempt to deliver to the connecting carrier. If there be a necessity for storage, it will be considered a mere accessory to the transportation, and not as changing the nature of the bailment. It is very clear that the simple deposit of the goods by the carrier in his depot, unaccompanied by any act indicating an intention to renounce the obligation of a carrier, will not change or modify even his liability. It may be that circumstances may arise after the goods have reached the depot which would justify the carrier in warehousing them; but if he had reasonable grounds to anticipate the occurrence of those adverse circumstances when he received the goods, he cannot by storing them change his relation towards them.

Testing the case in hand by these well-settled principles, it is apparent that the plaintiffs in error are not relieved of their proper responsibility, unless through the provisions of their charter, or by the terms of the receipt which was given when they received the wool. They neither delivered nor offered to deliver the wool to the

propeller company. Nor did they do any act manifesting an intention to divest themselves of the character of carrier and assume that of forwarder.

It is insisted that the offer to deliver would have been a useless act, because of the inability of the line of propellers, with their means of transportation, to receive and transport the freight which had already accumulated at the Michigan Central Depot for shipment by lake. One answer to this proposition is, that the company had no right to assume, in discharge of its obligation to this defendant, that an offer to deliver this particular shipment would have been met by a refusal to receive. Apart from this, how can the company set up, by way of defence, this limited ability of the propeller line when the officers of the road knew of it at the time the contract of carriage was entered into, and the other party to the contract had no information on the subject?

It is said, in reply to this objection, that the company could not have refused to receive the wool, having ample means of carriage, although it knew the line beyond Detroit selected by the shipper was not at the time in a situation to receive and transport it. It is true the company were obliged to carry for all persons, without favor, in the regular course of business, but this obligation did not dispense with a corresponding obligation on its part to inform the shipper of any unavoidable circumstances existing at the termination of its own route in the way of a prompt delivery to the carrier next in line. This is especially so when, as in this case, there were other lines of transportation from Detroit eastward by which the wool, without delay, could have been forwarded to its place of destination. Had the shipper at Jackson been informed, at the time, of the serious hindrances at Detroit to the speedy transit of goods by the lake, it is fair to infer, as a reasonable man, he would have given a different direction to his property. Common fairness requires that at least he should have been told of the condition of things there, and thus left free to choose, if he saw fit, another mode of conveyance. If this had been done there would be some plausibility in the position that six days was an unreasonable time to require the railroad company to hold the wool as a common carrier for delivery. But under the circumstances of this case the company had no right to expect an earlier period for delivery, and cannot, therefore, complain of the response of the jury to the inquiry on this subject submitted to them by the Circuit Court.

It is earnestly argued that the plaintiffs in error are relieved from liability under a provision contained in one section of their charter,[1] if not by the rules of the common law.

But it is quite clear, on reading the whole section, that it refers to property which has reached its final destination, and is there

[1] See the section, *supra*, pp. 320–321 **[295]**.—Rep.

awaiting delivery to its owner. If so, how can the proviso in question be made to apply to another and distinct class of property? To perform this office it must act independently of the rest of the section, and enlarge, rather than limit, the operation of it. This it cannot do, unless words are used which leave no doubt the legislature intended such an effect to be given to it.

It is argued, however, that there is no difference between goods to be delivered to the owner at their final destination, and goods delivered to the owner, or his agent, for further carriage. That in both cases, as soon as they are "ready to be delivered" over, they are "awaiting delivery." This position, although plausible, is not sound. There is a clear distinction, in our opinion, between property in a situation to be delivered over to the consignee on demand, and property on its way to a distant point to be taken thence by a connecting carrier. In the former case it may be said to be awaiting delivery; in the latter to be awaiting transportation. And this distinction is recognized by the Supreme Court of Michigan in the case of the present plaintiffs in error against Hale.[1] The court in speaking on this subject say, "that goods are on deposit in the depots of the company, either awaiting transportation or awaiting delivery, and that the section (now under consideration) has reference only to goods which have been transported and placed in the company's depots for delivery to the consignee." To the same effect is a recent decision of the Court of Appeals of New York,[2] in a suit brought to recover for the loss of goods by the same fire that consumed the wool in this case, and which were marked for conveyance by the same line of propellers on Lake Erie.

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Judgment affirmed.

MUSCHAMP *v.* THE LANCASTER AND PRESTON JUNCTION R. CO.

Exchequer of Pleas. 8 M. & W. 421. 1841.

Case. — The declaration stated, that, after the passing of a certain Act of Parliament, intituled "An Act for making and maintaining a Railway from the Town of Lancaster to the Town of Preston, in the county Palatine of Lancaster," the defendants were the proprietors of a certain railway, to wit, etc., and of certain engines and carriages used thereon; and the plaintiff, on, etc., caused to be offered and delivered to the defendants, to wit, as common carriers, and the defendants received as such carriers, a certain box, and

[1] 6 Michigan, 243.

[2] Mills *v.* Michigan Central Railroad Co., 45 New York, 622.

divers goods and chattels contained therein, of the plaintiff, to be safely and securely carried and conveyed for the plaintiff by the defendants, from Lancaster aforesaid, upon the said railway, and upon other railways, and to be caused by the defendants to be left at a certain other place, to wit, at a certain place called the Wheatsheaf, Bartlow, near Bakewell, Derbyshire, for the plaintiff, for certain reward to be therefore paid by the plaintiff to the defendants; yet the defendants contriving, etc., did not nor would convey the said box, etc., upon their said railway, nor upon other railways, or cause the same to be left at the said Wheatsheaf, etc., for the plaintiff; but through the negligence, carelessness, etc., of the defendants, the said box, goods, and chattels were wholly lost to the plaintiff.

Pleas, first, not guilty; secondly, that the plaintiff did not cause to be delivered to the defendants, nor did the defendants accept and receive the said box, etc., for the purpose and in the manner and form as the plaintiff has in his declaration alleged: — on which issues were joined.

At the trial before Rolfe, B., at the last assizes at Liverpool, the following facts appeared in evidence: — The defendants are the proprietors of the Lancaster and Preston Junction Railway, and carry on business on their line between Lancaster and Preston, as common carriers. At Preston the line joins the North Union Railway, which afterwards unites with the Liverpool and Manchester Railway at Parkside, and that with the Grand Junction Railway. The plaintiff, a stone-mason living at Lancaster, had gone into Derbyshire in search of work, leaving his box of tools to be sent after him. His mother accordingly took the box to the railway station at Lancaster, directed to the plaintiff, "to be left at the Wheatsheaf, Bartlow, near Bakewell, Derbyshire" (a place about eight miles wide of the Birmingham and Derby Junction Railway), and requested the clerk at the station to book it. In answer to her inquiries, he told her that the box would go in two or three days; and on her asking whether it would go sooner if the carriage was paid in advance, he inquired whether any one was going with it; on her answering in the negative, and that the person for whom it was intended would be ready at the other end to receive it, he said the carriage had better be paid for by that person on receipt of it. It appeared that the box arrived safely at Preston, but was lost after it was despatched from thence by the North Union Railway. Upon these facts the learned judge stated to the jury, in summing up, that where a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, that is *prima facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed; and the same rule applied, although that place were beyond the limits within which he in general professed

to carry on his trade of a carrier. The jury found a verdict for the plaintiff, damages £16 1*s.*

In Easter Term, *Cresswell* obtained a rule *nisi* for a new trial, on the ground of misdirection.

Martin now showed cause, and contended that there was no misdirection; that there was abundant evidence for the jury of an undertaking by the defendants, through their agent, to carry the box and its contents to the place of its ultimate destination; that if the carriage had been paid in advance, according to the offer made by the plaintiff's mother, the sum demanded would clearly have been the carriage for the whole distance; and that to suppose as many different contracts as there were carriers on a continuous line of railway, would be against all principle and convenience. — The court then called on

Cresswell, *Baines*, and *Burrell*, in support of the rule. This is not the case of a conveyance travelling throughout a continuous line, like a coach, for instance, which professes to run from London to York; in such a case parties are not bound to look out for the particular proprietors interested in the different parts of the line. But there it is held out to the public as *one line;* this is the case of a company known as the Lancaster and Preston Junction Railway, and holding themselves out to the world as the proprietors of and carriers upon that distinct line of railway only. To hold them liable for the loss of a parcel beyond the limits of their own line would therefore be very unjust. Suppose the case of a known coach from London to Stamford, and a party delivers to the book-keeper a parcel directed to York, does that prove a contract to carry it to York? [Lord Abinger, C. B. What would be the undertaking of the carrier in that case?] To carry to Stamford, and forward thence to York. Parties must be assumed to contract in reference to the known mode in which the carrier carries on his business. Suppose it had been alleged in this case that the defendants were common carriers from Lancaster to Derby, and that had been traversed; would evidence of the kind given on the part of the plaintiff have proved that they were? If the defendants are held liable in this case, it would follow, that a carrier who professed on his part to carry parcels one stage only from London, would be liable for the loss of a parcel at any place between London and the Land's End; or the owners of a steam-vessel plying between Liverpool and Belfast, by receiving a box directed to an inland town in Ireland, would be responsible for its safe delivery at that place. If it be so, the same principle must hold as to imputed negligence to *persons* as to goods. Now, suppose a passenger booked at Lancaster for London, and injured on the North Union Railway; could the proprietors of the Lancaster and Preston line be held responsible? The true construction of the defendant's contract is, that they engage to carry the goods safely as far as Preston — *i.e.*, as far as they hold

themselves out, and are empowered by their Act of Parliament to trade, as carriers — and then to put them in a course of carriage onward, by transferring them to another carrier, so as to give the owner, in the event of their loss, a right of action against the new bailees. Garside *v.* Trent and Mersey Navigation Company, 4 T. R. 581. [Lord Abinger, C. B. The defendants refuse to receive the money for the carriage at the time: does that not show that they treat the carriers forward as their agents, from whom they are to get their remuneration?] A contrary inference rather arises,— that they could not tell what the whole amount of the carriage would be, and therefore declined to receive it. If this be in law a contract to carry the whole distance, it must be so also, although the other party be fully cognizant of the terms on which the defendants carry on their business. [Lord Abinger, C. B. Do you say the successive carriers are agents of the original customer?] Yes, if the successive companies be known to him. [Rolfe, B. How is he to discover on which line the goods were lost?] In Upston *v.* Slark, 2 Car. & P. 598, the name of the defendant was over the door of a booking-house for coaches and wagons in Piccadilly, with the words "Conveyances to all parts of the world," followed by a list of places, amongst which was Windsor: yet it was held, that proof of the booking at that office of a box directed to Windsor, which did not reach its destination, was not sufficient to make the defendant responsible for its loss. So, in Gilbert *v.* Dale, 5 Ad. & Ell. 543, 1 Nev. & P. 22, which was an action brought for negligence in the loss of goods, against the proprietor of a general booking-office for the transmission of parcels by coach, it was held insufficient to prove that the goods never reached their destination. Coleridge, J., there says, "Suppose goods were left with carrier, to be taken by him to York, and from thence forwarded to Edinburgh, would it be sufficient, in an action against him for negligence, to show that the goods did not reach Edinburgh?" The same hardship which is recited in the preamble to the Carriers' Act, 1 Will. 4, c. 68, from the great increase of the responsibility and risk of common carriers, will occur again, if a carrier is to be held liable under such circumstances as these.

Lord Abinger, C. B. The simple question in this case is, whether the learned judge misdirected the jury in telling them that if the case were stripped of all other circumstances beyond the mere fact of knowledge by the party that the defendants were carriers only from Lancaster to Preston, and if, under such circumstances, they accepted a parcel to be carried on to a more distant place, they are liable for the loss of it, this being evidence whence the jury might infer that they undertook to carry it in safety to that place. I think that in this proposition there was no misdirection. It is admitted by the defendants' counsel that the defendants contract to do something more with the parcel than merely to carry it to

Preston; they say the engagement is to carry to Preston, and there to deliver it to an agent, who is to carry it further, who is afterwards to be replaced by another, and so on until the end of the journey. Now that is a very elaborate kind of contract; it is in substance giving to the carriers a general power, along the whole line of route, to make at their pleasure fresh contracts, which shall be binding upon the principal who employed them. But if, as admitted on both sides, it is clear that something more was meant to be done by the defendants than carry as far as Preston, is it not for the jury to say what is the contract, and *how much* more was undertaken to be done by them? Now it certainly might be true that the contract between these parties was such as that suggested by the counsel for the defendants; but other views of the case may be suggested quite as probable: such, for instance, as that these railway companies, though separate in themselves, are in the habit, for their own advantage, of making contracts, of which this was one, to convey goods along the whole line, to the ultimate terminus, each of them being agents of the other to carry them forward, and each receiving their share of the profits from the last. The fact that, according to the agreement proved, the carriage was to be paid at the end of the journey, rather confirms the notion that the persons who were to carry the goods from Preston to their final destination were under the control of the defendants, who consequently exercised some influence and agency beyond the immediate terminus of their own railway. Is it not then a question for the jury to say what the nature of this contract was; and is it not as reasonable an inference for them to draw, that the whole was one contract, as the contrary? I hardly think they would be likely to infer so elaborate a contract as that which the defendants' counsel suggests; namely, that as the line of the defendants' railway terminates at Preston, it is to be presumed that the plaintiff, who intrusted the goods to them, made it part of his bargain that they should employ for him a fresh agent both at that place and at every subsequent change of railway or conveyance, and on each shifting of the goods give such a document to the new agent as should render him responsible. Suppose the owner of goods sent under such circumstances, when he finds they do not come to hand, comes to the railway office and makes a complaint, then, if the defendants' argument in this case be well founded, unless the railway company refuses to supply him with the name of the new agent, they break their contract. It is true that, practically, it might make no great difference to the proprietor of the goods which was the real contract, if their not immediately furnishing him with the name would entitle him to bring an action against *them*. But the question is, why should the jury infer one of those contracts rather than the other? which of the two is the most natural, the most usual, the most probable? Besides, the carriage-money being in this case one undivided sum rather supports

the inference, that although these carriers carry only a certain distance with their own vehicles, they make subordinate contracts with the other carriers, and are partners *inter se* as to the carriage-money,— a fact of which the owner of the goods could know nothing; as he only pays the one entire sum at the end of the journey, which they afterwards divide as they please. Not only, therefore, is there some evidence of this being the nature of the contract, but it is the most likely contract under the circumstances; for it is admitted that the defendants undertook to do more than simply to carry the goods from Lancaster to Preston. The whole matter is therefore a question for the jury, to determine whether the contract was on the evidence before them. With respect to the case referred to, of the booking-office in London, it only goes to show that when persons take charge of parcels at such an office they merely make themselves agents to book for the stage-coaches. You go to the office and book a parcel; the effect of this is to make the booker your agent, instead of going to the coach-office yourself; and so that he sends the parcel to the proper coach-office, and once delivers it there, he has discharged himself; he has nothing to do with the *carriage* of the goods. In cases like the present, particular circumstances might no doubt be adduced to rebut the inference which, *prima facie*, must be made, of the defendants having undertaken to carry the goods the whole way. The taking charge of the parcel is not put as *conclusive* evidence of the contract sued on by the plaintiff; it is only *prima facie* evidence of it; and it is useful and reasonable for the benefit of the public that it should be so considered. It is better that those who undertake the carriage of parcels, for their mutual benefit, should arrange matters of this kind *inter se*, and should be taken each to have made the others their agents to carry forward.

Gurney, B. I think there is no misdirection in the case, and that the jury might fairly infer that the contract was such as was stated by the learned judge. If the goods were to be carried only in the narrow sense contended for by the defendants, then, if the place of their destination were but three miles beyond Preston, and they were lost on the other side of the railway terminus, the defendants are not to be liable, but the plaintiff is to find out somebody or other who is to be liable in respect of the carriage for those three miles.

Rolfe, B. I am of the same opinion, and think the construction we are putting on the agreement is not only consistent with law, but is the only one consistent with common-sense and the convenience of mankind. What I told the jury was only this, that if a party brings a parcel to a railway station, which in this respect is just the same as a coach-office, known at the time that the company only carry to a particular place, and if the railway company receive and book it to another place to which it is directed, *prima facie* they undertake to carry it to that other place. That was my view at the

trial, and nothing has occurred to alter my opinion. As to the case which has been put, of a passenger injured on the line of railway beyond that where he was originally booked, I suppose it is put as a *reductio ad absurdum;* but I do not see the absurdity. If I book my place at Euston Square, and pay to be carried to York, and am injured by negligence of somebody between Euston Square and York, I do not know why I am not to have my remedy against the party who so contracted to carry me to York. But, at all events, in the case of a parcel, any other construction would open the door to incalculable inconveniences. You book a parcel, and on its being lost, you are told that the carrier is responsible only for one portion of the line of road. What would be the answer of the owner of the goods? — "I know that I booked that parcel at the Golden Cross for Liverpool, and my contract with the carrier was to take it to Liverpool." All convenience is one way, and there is no authority the other way. *Rule discharged.*[1]

NUTTING *v.* CONNECTICUT RIVER R. CO.

1 Gray (Mass.), 502. 1854.

Action of contract to recover the value of two of the boxes described in the following receipt, signed by the defendants' agent: "Northampton, Mass., Feb. 27th, 1851. Received of E. Nutting, for transportation to New York, 9 boxes planes, marked R. & F. 21 Platt St., New York; 4 boxes planes and handles, marked G. T. Hewlett, 146 Bowery Street, New York.

"Fred W. Clarke."

The following facts were agreed by the parties: All the boxes named in this receipt were delivered by the defendants, within a reasonable time, at Springfield, the southern terminus of their road,

[1] The mere acceptance of goods by a common carrier marked to a designation beyond the terminus of its line as a matter of *law* imports no absolute undertaking upon the part of the carrier beyond the end of its road, but is a matter of evidence to be submitted to the jury, from which, in connection with other evidence produced, they are to determine, as a question of *fact*, the real engagement entered into.

This position was very ably maintained in a recent and elaborate opinion of the Supreme Court of New Hampshire, reviewing almost the whole current of decisions from Muschamp *v.* The Lancaster Railway Co., 8 M. & W. 421, down to the present period. See Gray *v.* Jackson, 51 N. H. 9. The question is not an open one in this State. In Angle *v.* The M. M. R'y Co., 9 Iowa, 487, the rule was settled as it is understood to exist in England, and it was held that the acceptance by a carrier of goods marked to a destination beyond the terminus of its road, creates a *prima facie* liability to transport to and deliver at that point, which may be modified by proof of a different usage known to the shipper at the time of making the consignment. Per Day, J., in Mulligan *v.* Illinois Central R. Co., 36 Iowa, 181.

to the New Haven, Hartford, and Springfield Railroad Company, with whose road the defendants' road there connects. The New Haven, Hartford, and Springfield Railroad extends from Springfield to New Haven, and there connects with the New York and New Haven Railroad, which extends to the city of New York. The defendants took a receipt for these boxes from the New Haven, Hartford, and Springfield Railroad Company; and all the boxes were duly delivered in New York, except two, which were lost between Springfield and New Haven.

It is the practice of the defendants, who are common carriers, to convey goods, received at places on the line of their road for transportation to New York, in their own cars to Springfield, and there to deliver them to the New Haven, Hartford, and Springfield Railroad Company, by whose agents the goods are overhauled and checked. Such goods are sometimes carried over the New Haven, Hartford, and Springfield Railroad without change of cars, and are sometimes shifted into the cars of that company. But the defendants receive pay only as far as Springfield. When goods are brought from New York to places on the line of the defendants' road, they are brought either in the freight cars of the defendants, or of one of the two corporations above mentioned, or of the Vermont Valley Railroad Company, whose road extends from the northern terminus of the defendants' road into the State of Vermont.

The parties agreed that if the defendants were not liable to the plaintiff judgment should be entered for them; otherwise, that the plaintiff should have judgment for $25.50, the value of the lost boxes and their contents.

Metcalf, J. On the facts of this case, we are of opinion that there must be judgment for the defendants. Springfield is the southern terminus of their road; and no connection in business is shown between them and any other railroad company. When they carry goods that are destined beyond that terminus, they take pay only for the transportation over their own road. What, then, is the obligation imposed on them by law, in the absence of any special contract by them, when they receive goods at their depot in Northampton, which are marked with the names of the consignees in the city of New York? In our judgment that obligation is nothing more than to transport the goods safely to the end of their road, and there deliver them to the proper carriers, to be forwarded towards their ultimate destination. This the defendants did, in the present case, and in so doing performed their full legal duty. If they can be held liable for a loss that happens on any railroad besides their own, we know not what is the limit of their liability. If they are liable in this case, we do not see why they would not also be liable if the boxes had been marked for consignees in Chicago, and had been lost between that place and Detroit, on a road with which they had no more connection than they have with any railway in Europe.

But the plaintiff seeks to charge the defendants on the receipt given by Clarke, their agent, as on a special contract that the boxes should be safely carried the whole distance between Northampton and New York. We cannot so construe the receipt. It merely states the fact that the boxes had been received "for transportation to New York." And the plaintiff might have proved that fact, with the same legal consequences to the defendants, by oral testimony, if he had not taken a receipt. That receipt, in our opinion, imposed on the defendants no further obligation than the law imposed without it.

The plaintiff's counsel relied on the case of Muschamp *v.* Lancaster & Preston Junction Railway, 8 M. & W. 421, in which it was decided by the Court of Exchequer, that when a railway company take into their care a parcel directed to a particular place, and do not by positive agreement limit their responsibility to a part only of the distance, that is *prima facie* evidence of an undertaking to carry the parcel to the place to which it is directed, although that place be beyond the limits within which the company, in general, profess to carry on their business of carriers. And two justices of the Queen's Bench subsequently made a like decision. Watson *v.* Ambergate, Nottingham & Boston Railway, 3 Eng. Law & Eq. R. 497. We cannot concur in that view of the law; and we are sustained, in our dissent from it, by the Court of Errors in New York, and by the Supreme Courts of Vermont and Connecticut. Van Santvoord *v.* St. John, 6 Hill, 157. Farmers' & Mechanics' Bank *v.* Champlain Transportation Company, 18 Verm. 140, and 23 Verm. 209. Hood *v.* New York & New Haven Railroad, 22 Conn. 1. In these cases, the decision in Weed *v.* Saratoga & Schenectady Railroad, 19 Wend. 534 (which was cited by the present plaintiff's counsel), was said to be distinguishable from such a case as this, and to be reconcilable with the rule that each carrier is bound only to the end of his route, unless he makes a special contract that binds him further.

Judgment for the defendants.[1]

THE ATCHISON, TOPEKA & SANTA FÉ R. CO. *v.* ROACH.

35 Kan. 740. 1886.

Action brought by Roach against The Railroad Company, to recover the value of certain baggage. Trial at the September Term, 1884, and judgment for plaintiff for $227.32. The defendant com-

[1] Accord: Myrick *v.* Michigan Central R. Co., 107 U. S. 102.

pany brings the case to this court. The opinion states the material facts.

JOHNSTON, J. This action was brought by Michael Roach against the Atchison, Topeka & Santa Fé Railroad Company, to recover for baggage alleged to have been lost and injured while in transit from New York City to Hutchinson, Kansas. A verdict was given in favor of Roach for $227.32, and judgment rendered accordingly. The railroad company brings the case here, and complains of the charge of the court and of the insufficiency of the evidence. The essential facts of the case may be briefly stated: On February 28, 1881, Roach purchased eight coupon tickets for the passage of himself and family from the city of New York to Hutchinson, Kansas, over the New York, Lake Erie & Western Railroad, Grand Trunk Railway, Michigan Central Railroad, Chicago, Burlington & Quincy Railroad, Hannibal & St. Joseph Railroad, and Atchison, Topeka & Santa Fé Railroad. The tickets were purchased from one Henry Opperman, who had an office in New York, and who at the same time caused several pieces of baggage to be checked through to Hutchinson, using checks on which the names of the roads mentioned were stamped. As there was more baggage than could be carried on the tickets purchased, Roach was required to and did pay $62.15 for extra baggage, and Opperman gave him duplicates of the checks, which he retained. The defendant in error and his family made the journey over the roads mentioned, and the tickets were honored and accepted for their passage, and the servants of the several companies detached the coupons or portions of the ticket that represented the passage-money over the different roads. When the passengers reached Hutchinson application was made for the baggage, and it was found that some of it had been lost, and portions of it badly injured. The testimony tended to show that the baggage was delivered to the first carrier in good condition, but on what road or roads the loss or injury occurred was not shown. The plaintiff below sought to recover upon two theories: one that Opperman, who sold the tickets, was the agent of the A. T. & S. F. Rld. Co., and that that company undertook to carry the passengers and baggage over the entire route, and that, being the contracting carrier, it was liable for the loss and injury regardless of where and upon what road it occurred. The other theory is, that the several roads constitute a connected and united line, and that the combination and running arrangements existing among the owners of the roads were such as amounted in effect to a partnership, and therefore the injury and loss was a common liability, and each and all of the companies are liable, no matter upon what part of the line the loss occurred. No recovery can be had upon the first theory, for the reason that the testimony wholly fails to establish that Opperman was the agent of the defendant company. Some of the witnesses for Roach spoke of Opperman as the agent of that company,

while others stated that he was agent of the New York, Lake Erie & Western Railroad Company. It was however developed upon cross-examination, that they had no knowledge of his authority or agency beyond his action in the sale of the tickets and the checking of the baggage. Opperman testified that he was the authorized agent of the New York, Lake Erie & Western Railroad Company, and sold tickets for and as the agent of that company, and that he did not represent and was not the agent of the defendant company. There was other testimony to the same effect, and also that when Roach purchased his tickets the defendant company had no tickets on sale in or about the city of New York. The theory that the defendant company was the original contracting carrier finds no support in the testimony, and no liability arises against the company on that ground. Where then is the liability? It is contended by the railroad company that the New York, Lake Erie & Western Railroad Company, being the first carrier, is alone liable. While a railroad company cannot be compelled to transport to a point beyond its own line, it is well settled that it may lawfully contract to carry persons and property over its own and other lines to a destination beyond its own route; and when such a contract is made, it assumes all the obligations of a carrier over the connecting lines as well as its own. In such cases the connecting carriers engaged in completing the carriage are deemed to be agents of the first carrier, for whose negligence and default the contracting carrier becomes liable. Berg *v.* A. T. & S. F. Rld. Co., 30 Kas. 561; Lawson's Contracts of Carriers, § 235; Hutchinson on Carriers, § 145; Thompson's Carriers of Passengers, p. 431; 2 Rorer on Railroads, p. 1234. Of course a railroad company or other common carrier may limit its liability to the loss or injury occurring on its own line, and the understanding or contract between the parties is to be determined from the facts of each case. Some of the courts have held that the mere acceptance of the property marked for transportation to a place beyond the terminus of the road of the accepting carrier, amounts to an undertaking to carry to the ultimate destination, whatever that may be; and in the absence of any conditions or limitations to the contrary, will make it liable for a loss occurring upon the connecting lines as well as its own; while others hold that in such a case the carrier is only bound to safely carry to the end of its own route, and there to deliver to the connecting carrier for the completion of the carriage. Lawson's Contracts of Carriers, §§ 238, 239, 240. But where a railroad company sells a through ticket for a single fare over its own and other roads, and checks the baggage of the passenger over the entire route, more is implied, it seems to us, than the mere acceptance of the property marked for a destination beyond the terminus of its own line. The sale of a through ticket and the checking of the baggage for the whole distance is some evidence of an undertaking to carry the passenger and baggage

to the end of the journey. The contract need not be an express one, but may arise by implication and may be established by circumstances the same as other contracts. In Wisconsin a passenger purchased a through ticket from the Chicago & Milwaukee Railway Company from Milwaukee to New York City, and at the same time delivered her trunk to that company, and received therefor a through check to New York City. Upon arrival at New York the trunk was found to have been opened and some of the articles taken therefrom. The Supreme Court, in ruling upon the effect of the railway company issuing the through ticket and check, stated that: —

"The ticket and check given by the Chicago & Milwaukee Railway Company implied a special undertaking by that company to safely transport and carry, or cause to be safely transported and carried, the plaintiff and her baggage over the roads mentioned in the complaint, from Milwaukee to the city of New York. This we think must in legal contemplation be the nature and extent of the contract entered into and assumed by that company when it sold the plaintiff the through ticket and gave a through check for the trunk, and received the fare for the entire route." Candee *v.* Pennsylvania Rld. Co., 21 Wis. 582; Ill. Cent. Rld. Co. *v.* Copeland, 24 Ill. 332; Carter *v.* Peck, 4 Sneed [Tenn.], 203; Railroad *v.* Weaver, 9 Lea, 38; B. & O. Rld. Co. *v.* Campbell, 36 Ohio St. 647; same case, 3 Am. & Eng. Rld. Cases, 246; 2 Rorer on Railroads, p. 1001.

From the authorities we conclude that the sale of a through ticket for a single fare by a railroad company to a point on a connecting line, together with the checking of the baggage through to the destination, is evidence tending to show an undertaking to carry the passenger and baggage the whole distance, and which in the absence of other conditions or limitations and of all other circumstances will make such carrier liable for faithful performance, and for all loss on connecting lines, the same as on its own. The liability of the first carrier does not necessarily relieve the defendant company from responsibility. Each carrier is liable for the result of its own negligence, and although the first carrier may have assumed the responsibility for the transportation to a point beyond its own route, any of the subsequent or connecting carriers to whose default it can be traced will be liable to the owner for the loss of his baggage. Hutchinson on Carriers, § 715; Aigen *v.* Boston & Maine Rld. Co., 132 Mass. 423; Railroad *v.* Weaver, 9 Lea, 39.

The defendant company cannot, however, be held liable upon that ground, because there is no evidence that the baggage was injured or lost while in the custody of that company, nor was it in fact shown upon what part of the route the injury or loss occurred.

The other theory upon which a recovery is sought is, that the several connecting lines over which the baggage was to be carried should be treated as a continuous and united line, and that the

arrangements made by the several lines for through traffic was such as to constitute them a partnership. There is a singular lack of testimony in the case, not only respecting the terms of the contract with the passenger, but also in regard to the relations existing among the several carriers. Not a word of testimony was introduced as to the running arrangements between the companies, nor the basis upon which through business was done. The practice or custom of the companies in the past was not shown, neither was there any proof that they had ever co-operated, or had done any through business beyond the transaction in question. It was not even shown what the form of the ticket was, nor what were the stipulations, if any, printed on them. There was in fact no evidence upon which to predicate a theory of partnership, or that each of the companies was the agent of all the others, except the single transaction of selling the tickets and checking the baggage. It is doubtless true that arrangements are frequently made among railroad companies whose lines connect, for through traffic, which constitute them partners. Such an arrangement is greatly to the advantage of the companies: the convenience which it affords the public invites business, and swells the traffic of the companies engaged in the joint enterprise. These arrangements among associated lines render it difficult for the passenger or shipper, in case of loss or injury of his property, to ascertain where the loss occurred; but no such difficulty lies in the way of the railroad companies; they have the facilities and can easily trace the property to the company which caused the injury or loss. In interpreting the agreements and conduct of associated lines engaged in a through traffic, public policy and the inconvenience mentioned should be considered, and they should be fairly and liberally interpreted towards the patrons of the lines holding the companies, where it is admissible under the rules of the law, to a common liability as partners. But such arrangements for through traffic cannot be held to be a partnership, unless there is a community of interest among the companies, and under which each shares the profits and losses of the enterprise. The mere sale of a through coupon ticket over the connecting lines of several companies, and the checking of the baggage to the end of the route does not show such a community of interest as would make them partners *inter sese*, or as to third persons. This question has been directly adjudged. A through ticket was purchased for passage from New York to Washington over three lines of railroad which constituted a through line for the transportation of passengers and freight, and the passenger purchasing the ticket received a through check for her baggage. It appeared that the fare received for through tickets was accounted for by the company selling the tickets to the other lines according to certain established rates, but there was no division of losses; and it was held in an action against the last carrier to recover for lost baggage, that the first carrier was

liable for losses occurring on its own line, as well as any other connecting line throughout the whole distance, but that the arrangement of the three companies for the sale of through tickets and the issuance of through checks, while it resembled a partnership, did not constitute one, nor make any of the connecting carriers liable for a loss not occurring on its own line. Croft *v.* B. & O. Rld. Co., 1 McArthur, 492.

In Hartan *v.* Eastern Railroad Co., 114 Mass. 44, it was ruled that arrangements between connecting roads forming a continuous line for the sale of through coupon tickets, which enabled passengers to pass over all the roads without change of cars, did not imply joint interest or joint liability. In another case, where several carriers whose lines connected made an agreement among themselves to appoint a common agent at each end of a continuous line to sell through tickets and receive fare, it was held that this arrangement did not constitute them partners as to passengers who purchased through tickets, so as to render each of the companies liable for losses occurring on any portion of the line. Ellsworth *v.* Tartt, 26 Ala. 733. A somewhat similar case was decided in New York. There a passenger purchased a through ticket from New York to Montreal over several connecting lines of railroad, owned by several companies. The ticket was a strip of paper divided into coupons, whereof one was to be detached and surrendered to the conductor of each line on the route. The passenger, instead of giving his valise into the charge of the agent of the company and receiving a check therefor, kept it in his own charge to the terminus of the line of the first carrier, where he delivered it to the agent of the connecting line, who checked it through to another point on the road. It appeared that an arrangement had been entered into between the various lines from New York to Montreal to connect regularly. Tickets were sold in New York for the entire route or intermediate places, under the direction of a general agent, who was paid by the several companies. The rate of fare was different on the different roads, and each company received its own proportion of the whole fare or passage-money at the close or at the beginning of every month, according to the established rates of fare. It was held that there was nothing in an arrangement like this to constitute the different companies partners for the transportation of passengers or baggage, so as to make one of them liable in common with the others for the loss of the valise. It was decided that "the arrangement may be beneficial to them as well as to the public, inasmuch as by facilitating travel, it may tend to increase it, but that would not create that joint interest, that community in profit and loss which is essential to the existence of a partnership." Straiton *v.* New York & New Haven Rld. Co., 2 E. D. Smith, 184; Hot Springs Rld. Co. *v.* Tripple & Co., 42 Ark. 465; same case, 18 Am. & Eng. Rld. Cas. 562; Aigen *v.* Boston & Maine Rld. Co., 132 Mass. 423; same

case, 6 Am. & Eng. Rld. Cas. 426; Darling *v.* Boston & Worcester Rld. Co., 11 Allen, 295; Kessler *v.* Railroad Co., 61 N. Y. 538; Irwin *v.* Rld. Co., 92 Ill. 103; Insurance Co. *v.* Rld. Co., 104 U. S. 146; same case, 3 Am. & Eng. Rld. Cas. 260.

Among the cases relied on by the defendant in error is Hart *v.* Rld. Co., 4 Selden, 37. In that case the defendant, which was one of three railroad companies owning distinct portions of a continuous road, was held liable for the loss of the baggage of a passenger received at one terminus to be carried over the whole road. The liability was not, however, based alone upon the selling of the ticket and the checking of the baggage. In addition to through tickets, it appeared that under the agreement made each of the railroad companies ran its cars over the whole route, and employed the same agents to sell passage-tickets. Besides these facts, it appeared that the lost baggage had been placed directly in charge of the servants of the defendant company, and that its loss was due in part to the negligence of that company.

Texas & Pacific Rld. Co. *v.* Fort, a decision by the commission of appeals of the State of Texas, reported in 9 Am. & Eng. Rld. Cases, 392, is also relied on. There it is held that the delivery of through checks, upon which were stamped letters indicating the different railways over which the baggage would go, constituted a contract under which the several companies were liable, regardless of the line upon which the loss occurred, — a proposition to which we cannot accede. The decision in this case is based upon the ruling in Hart *v.* Railroad Co., *supra*, which, as we have seen, was determined upon other considerations. The same may also be said respecting Texas & Pacific Railway Co. *v.* Ferguson, another decision of the commission of appeals of Texas, 9 Am. & Eng. Rld. Cases, 395, as well as Hart *v.* The Grand Era, 1 Woods C. C. 184.

The only other case relied on is Wolf *v.* Central Rld. Co., 68 Ga. 653. It was there held that where a passenger with a through ticket over a connecting line checked his baggage at the starting-point through to his destination, and upon arrival there found that it had been injured, he might sue the railroad company which issued the check or the one delivering the baggage in bad order. Upon the facts in that case the court determined that the company selling the tickets was to be regarded as the agent of the other companies composing the line, and intimated that where a passenger travels over a continuous line on a through ticket, and the baggage is sent on a through check, that any one of the companies may be held liable for spoliation of the baggage, irrespective of the point at which it actually occurred; and the query is also raised as to whether they are jointly liable as partners. The writer of the opinion held that by the sale of the tickets and the division of the receipts at periodical settlements they acted as principals and not as agents, and that

by such action they stood substantially in the position of partner in the through business, and were jointly and severally liable as such. The concurrence of the other justices was, however, placed upon the ground that as the last carrier, and the one which was sued, received the baggage in apparent good condition, it was presumably liable, and the Chief Justice stated that this was the exact point decided. It is difficult in many cases to determine whether the arrangements and agreements of connecting carriers are such as to constitute each of them principals, or to place them in the relation of partners; but neither upon reason or authority can we hold that the sale of through tickets and the checking of baggage over the connecting lines of several companies, without other proof of their relations or the basis upon which the business was done, is sufficient to make them jointly and severally liable as partners.

The instructions of the court not being in accord with the views herein expressed, and the evidence being insufficient to support the verdict, the judgment of the District Court must therefore be reversed, and the cause remanded for another trial.

All the justices concurring.

PETERSON *v.* CHICAGO, ROCK ISLAND AND PACIFIC R. CO.

80 Iowa, 92. 1890.

The plaintiff seeks to recover of the defendants, who are common carriers of passengers and baggage, the value of certain wearing apparel, ornaments, and other property which were stolen from certain trunks of the plaintiff and her husband, while being conveyed as baggage from Davenport, in this State, to the city of Los Angeles, in the State of California. There was a trial by jury, and at the close of the introduction of the evidence the court, on the motion of the defendants, directed the jury to return a verdict for the defendants. Plaintiff appeals.

Rothrock, C. J. . . . . .

II. In an amendment to the petition the plaintiff set up a second and further cause of action, in which it is, in substance, alleged that, at the time the tickets were purchased by Peterson and the journey was made, the four railroad companies owned and operated by the defendants formed a complete connecting line of railway from Davenport to Los Angeles, and at said time said four defendants had formed and entered into an agreement and combination for the purpose of transporting passengers and their baggage from Davenport to Los Angeles, by using said four lines of railway as a

continuous line between said places, and making one fare or charge for such transportation for the entire distance, "that said business of transporting said baggage was done by defendants in such a manner that it was impossible for plaintiff or her husband to know or discover at what particular place on said route said property was so taken from trunks, and she is, therefore, unable to state." There was no evidence to sustain this count of the petition as against the Chicago, Rock Island and Pacific Railway Company. On the contrary, it is expressly provided, on the face of the ticket, that the said company assumed "no responsibility beyond its own line." It did not check the baggage beyond its own line, and the evidence shows that the trunks were not opened while they were in the possession of that company. When the baggage was delivered at Kansas City, the checks taken up and the trunks rechecked, the contract, so far as the Rock Island Company was concerned, was fully performed. The court is committed to the doctrine that the receiving or initial carrier may, by a stipulation in the bill of lading or contract of carriage, limit its liability to injuries to the consignment which occur on its own line. Mulligan *v.* Railway Co., 36 Iowa, 181. We do not understand counsel for appellant to claim that the court erred in directing a verdict for the Rock Island Company, and it has made no appearance in this court, and has not filed either brief or argument.

The important question to be determined in the case is whether the other three defendants are jointly, or, rather, jointly and severally, liable for the pillage of plaintiff's baggage. That some one of them is liable there can be no serious question. It is true that larceny may have been committed by the employees of the transfer company at Los Angeles. But, in view of the brief time between the delivery of the checks and the arrival of the baggage at the hotel, this is not at all probable. To determine this question, it will be necessary to analyze the contract, and determine its legal effect upon the rights of the parties. It will be observed that the ticket does not provide that the Atchison, Topeka, and Santa Fé, the Atlantic and Pacific, and the California Southern Railroad companies assumed no responsibility beyond their own line. Their obligation is, therefore, to be determined by the ticket with the coupons attached, and by the other facts developed in the evidence tending to show what the real contract was; and here it is proper to say that a railroad passenger ticket does not ordinarily import a complete contract. It is in some sense like a check for baggage. It is issued by the carrier as the evidence of the right of the passenger to transportation between the points named on the face of the ticket. It is surely not as complete a contract in form as a bill of lading for the transportation of goods, and a bill of lading is everywhere recognized as a receipt as well as a contract. In the case of Steamboat Co. *v.* Brown, 54 Pa. St. 77, speaking of a bill of lading, it is said:

"On its face, it is but a memorandum, and not in form a contract *inter partes*. It is doubtless an instrument fitted for the occasion in which it is usually employed; and while what is clearly expressed may not be contradicted by oral testimony, unless under the qualification of fraud or mistake, yet there is no rule which excludes testimony to explain it, and to show what the real contract was, of which it is but a note or memorandum at best." And see Quimby *v.* Vanderbilt, 17 N. Y. 306. This court has determined that, where a contract is partly in writing and partly by verbal agreement, parol evidence may be introduced to show the portion of the contract not reduced to writing. Singer Sewing Machine Co. *v.* Holcomb, 40 Iowa, 43; Keen *v.* Beckman, 66 Iowa, 672.

Applying this rule to the evidence in the case, it appears that the Rock Island Railroad Company or its ticket agent was authorized to sell through tickets over the three roads, and to collect and receive the full fare for the whole distance from Kansas City to Los Angeles. How this was divided among the said companies does not appear. So far as it appeared to Peterson, the purchaser of the tickets, it was a joint transaction. The ticket recognizes the right of the passenger to have the baggage transported over the respective lines, and an attempt was made to limit the liability to one hundred dollars, but no reference is made to any several liability of any company forming the line, except the Rock Island Company. The Rock Island Company, as the agent of the other lines, had no authority to check baggage over them. This is apparent from the fact that the trunks were passed over the Rock Island road without question as to their weight; but, when they were rechecked by the Atchison, Topeka, and Santa Fé Company at Kansas City, the sum of twenty-seven dollars on extra baggage was exacted by the company, and paid by Peterson, and in consideration thereof the baggage was checked through to Los Angeles. This was, in effect, paying to all three of the companies for carrying extra baggage from Kansas City to the end of the journey. It appears that the trunks and Peterson and his family were all carried through to Los Angeles on the same train. It does not appear whether there was any change of passenger or baggage cars in the train. The checks delivered to Peterson at Kansas City imported an obligation on the part of the three companies to carry the baggage through to its destination. A check for baggage has the same elements of a contract as an ordinary railway passenger ticket. It is, to say the least, some evidence of the contract between the carrier and the traveller for the transportation of his baggage. Anderson *v.* Railway Co., 65 Iowa, 131. An examination of the coupon attached to the ticket above set out will show that, at the foot of the coupon, the initials of all of the defendants appear. It is not claimed that these initials are not intended to represent the defendants. There is no evidence tending to show for what purpose these initials were placed there, but it is conceded

they were on all the coupons. It is contended by counsel for appellees that these initials were placed upon the coupons to indicate the route pursued by the traveller. Counsel for appellant claim that they are signatures to a contract. In the absence of any evidence, and in construing the contract so far as it is written, and in connection with the facts above recited, we think the defendants ought not to complain if it be held that they imported a joint obligation upon the part of the defendants, except the Rock Island Company, which, by the express stipulation in the body of the ticket, is not bound for any failure beyond its own line. The appearance of these initial letters on all the coupons was, to say the least, an important fact, to be considered in determining whether, as to the last three roads in the line, there were three separate contracts or one joint contract; and we can see no valid reason why it may not be held that the contract, so far as the last three roads are concerned, was completed by what occurred at Kansas City and afterwards. It is true the Atchison, Topeka, and Santa Fé Company was an intermediate carrier. But such a carrier may, by its contract, make itself liable for the safe transportation of the baggage through the entire route. Beard *v.* Railway Co., 79 Iowa, 518.

It is important to understand just what question was determined by the District Court. The direction to the jury to return a verdict for the defendants was, in effect, a holding that there was not sufficient evidence to submit to the jury to justify a verdict that the defendants were jointly liable. In other words, that the ticket, with the coupons attached, together with parol evidence, showed that four separate contracts were made, which made four causes of action, or one action against each company for spoliation of the baggage on its road only, and that there was, therefore, a misjoinder of causes of action. If this was correct, there could be no recovery against either company, because there was no evidence at what point of the line the trunks were unlocked and the property removed. The counsel for the plaintiff cited a large number of cases, which it is claimed hold that, under like facts, the several lines are held to be jointly liable, and other cases where the last carrier in the continuous line is held liable. The following are some of the authorities relied upon: Laughlin *v.* Railway Co., 28 Wis. 204; Brintnall *v.* Railway Co., 32 Vt. 665; Hart *v.* Railway Co., 8 N. Y. 37; Fairchild *v.* Slocum, 19 Wend. 329; Wolff *v.* Railway Co., 68 Ga. 653; Railway Co. *v.* McIntosh, 73 Ga. 532; Barter *v.* Wheeler, 49 N. H. 9; and Harp *v.* The Grand Era, 1 Woods, 184.

In the last above case the action was against an intermediate carrier, and in all the others the action was either against the receiving carrier or the last one in the line. In one of the cases — that of Laughlin *v.* Railway Co. — the action was against the last carrier. There was no evidence at what point the goods were stolen, and the court held the defendants liable upon the presumption that the goods

were stolen in the possession of the last carrier. In Brintnall *v.* Railway Co., the plaintiff was permitted to recover of the receiving carrier, because, when the goods were shown to have been in its custody, it was incumbent on it to show that it had delivered the goods to the next carrier in the line. It may be said of all the cited cases that they rest mainly upon what is deemed presumptions. These presumptions are grounded upon the necessities of the case, rather than upon any clear and well-defined legal grounds. Indeed, many of them are really grounded upon the thought that, where it is impossible for the owner to show upon which part of the whole line of travel the property was lost or stolen, it is incumbent on the defendant to show itself clear of the loss. In one of the cited cases, Smith *v.* Railway Co., 43 Barb. 225, it is said: "Unless this rule is to be applied to goods delivered, to be transported over several connecting railroads, there would be no safety to the owner. It would often be impossible for him to prove at what point, or in the hands of what company, the injury happened." Others of the cited cases hold the defendants liable upon grounds which are really based upon the thought that all of the connecting lines are jointly liable. This is true of the case of Wolff *v.* Railway Co., 68 Ga. 653; and in Railway Co. *v.* Fort, 9 Am. & Eng. R. R. Cas. 392, and Railway Co. *v.* Ferguson, 9 Am. & Eng. R. R. Cas. 395, the Supreme Court of Texas holds that, when a person purchases a through ticket over several railroads, and procures a corresponding check for his baggage, and the baggage is lost, each carrier is the agent of all the others, and is liable to any damage to the baggage on whatever part of the line the damage was done. The case of Harp *v.* The Grand Era, *supra*, is to the same effect.

On the other hand, we are cited by counsel for appellee to a large number of cases which determine that, where several connecting companies form a through line, each operating its own road, and through tickets with coupons attached are sold over the entire route for a single fare, there is no joint liability by reason thereof, and each carrier will only be liable for defaults occurring on its own road, except that in some States the receiving carrier is presumed to contract for carriage over the entire route. Among the cases cited are the following: Ellsworth *v.* Tartt, 26 Ala. 733; Hood *v.* Railway Co., 22 Conn. 12; Knight *v.* Railway Co., 56 Me. 240; Croft *v.* Railway Co., 1 McArthur, 492; Kessler *v.* Railway Co., 61 N. Y. 538; Railway Co. *v.* Roach, 35 Kan. 740; 12 Pac. Rep. 93. The length of this opinion forbids that we should review these cases.

After a very full and careful examination of the subject, Mr. Hutchinson, in his work on carriers (page 131), says: "From the cases it may be deduced: *First*, that where carriers over different routes have associated themselves under a contract for a division of the profits of the carriage in certain proportions, or of the receipts from it, after deducting any of the expenses of the business, they

become jointly liable as partners to third persons; but that, where the agreement is that each shall bear the expenses of his own route, and of the transportation upon it, and that the gross receipts shall be divided in proportion to distance or otherwise, they are partners neither *inter se* nor as to third persons, and incur no joint liability." We think this is a fair statement of the rule of joint liability which is supported by the great weight of authority.

It only remains to be determined whether the evidence in this case authorized the jury to find a joint liability. We think it did. It is true there is no express proof that these defendants were partners. But it is to be remembered that the plaintiff made the best proof of which her case was capable. The fact as to the relation which these companies sustained to each other, and the impossibility of proving where or on which road the trunks were pillaged; the receipt of the whole of the fare by their joint agent, the Rock Island Railway Company; the collection of the charge for extra baggage at Kansas City; and the fact that the trunks were checked through and carried to the end of the journey on the same train with Peterson and his family; and the initials of all of the companies to each coupon, authorized a finding that the undertaking was a joint transaction, at least so far as the rights of the passengers to have their baggage safely carried were involved. In our opinion, the case ought to have been submitted to the jury.

Reversed.

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b. *Delivery to Consignee.*

SWEET *v.* BARNEY.

23 N. Y. 335. 1861.

Appeal from the Supreme Court. Action against the defendants, an express company, as common carriers, to recover the amount of a package of money, received by the defendants, directed to the "People's Bank, 173 Canal Street, New York." The defendants had a verdict at the circuit, which was affirmed at the General Term of the Supreme Court in the seventh district, and the plaintiffs appealed to this court.

The proof showed these facts: The plaintiffs were bankers at Dansville, Livingston County. They kept an account with the People's Bank, in which they were in the habit of making deposits and drawing bills of exchange or checks against the same. A package containing $2,892 was delivered by them to the defendants, directed "People's Bank, 173 Canal Street, New York," to be forwarded as directed. The package was taken to New York, and

delivered at the defendant's office in that city to one Messenger, an employee of the People's Bank. Messenger was a porter in the People's Bank, and had been for several years; was accustomed to receive money brought by the defendant's company at the bank, at the Clearing House and at the defendant's office. Messenger was also accustomed to act for the People's Bank in making exchanges and collections with other banks; and he acted as its representative at the Clearing House, at a desk labelled "People's Bank;" had there often received packages of money from the defendants addressed to "People's Bank" and given receipts for the same for said bank. The defendants' office was in the same building with the Clearing House, and Messenger requested the defendants to keep the packages for the People's Bank at their office until he called for them. The defendants did so, and Messenger regularly called for them and received them, and gave receipts. In the eighteen days previous to the delivery of this, nine other packages for the People's Bank were delivered to and receipted by Messenger without any complaint or objection from the bank. After the delivery to Messenger of the package in question it was stolen from him.

The plaintiff's counsel requested the judge to charge the jury that the duty of the defendants was to deliver the package at the bank as directed, and they were not authorized to deliver the same to any person at any place other than at the bank. 2. That neither the bank nor the defendants were authorized to change the mode of delivery of the package without the consent or knowledge of the plaintiffs; and that such change, if made without their knowledge or consent, would not discharge the defendants.

The judge refused both of these requests, and the plaintiffs' counsel excepted to such refusal. The judge charged that a delivery to an agent of the bank, authorized by it to receive the package, at any place other than the bank, would discharge the defendant, to which the plaintiffs' counsel also excepted.

James, J. That these defendants were common carriers can hardly be doubted. Persons whose business it is to receive packages of bullion, coin, bank notes, commercial paper, and such other articles of value as parties see fit to trust to their care for the purpose of transporting the same from one place to another for a compensation, are common carriers, and responsible as such for the safe delivery of property intrusted to them. Russell *v.* Livingston, 19 Barb. 346; Sherman *v.* Wells, 28 Barb. 403. Such was the business of these defendants, and such their responsibility.

The consignee is the presumptive owner of the thing consigned; and when the carrier is not advised that any different relation exists, he is bound to so treat the consignee; but this presumption may be rebutted; and if in an action for non-delivery by the consignor against the carrier that presumption be overcome, the action is properly brought in the consignor's name. Price *v.* Powell, 3 Comst.

322. But in this case, unless a delivery of the money be established, the plaintiffs' right to recover was made out.

There was no notice of the contents of the package in question belonging to the consignors: nor was there any fact proved, calculated to weaken the presumption of ownership in the consignee. The defendants were, therefore, not only authorized, but fully justified in treating the consignment as the property of the bank. The defendants could not know that they were employed to make a deposit in the People's Bank for the benefit of the assignors; or that this package was entitled to or demanded a special delivery. There was, in fact, nothing in the transaction to advise them that this package was to be treated differently from other packages actually belonging to the bank; and, therefore, any delivery good against the bank discharged the carrier.

The principal question then is, was there a delivery good against the bank; if there was, the plaintiffs must follow the bank; they have no cause for action against these defendants. It is conceded that the liability of a carrier begins with the receipt of the goods by him, and continues until the delivery of the goods by him, subject to the general exceptions. And an express carrier is bound to deliver the goods at their destined place, to the consignee, or as the consignee may direct. In general, the delivery must be to the owner or consignee himself, or to his agent, 11 Met. 509, or they must be carried to his residence, or they may be taken to his place of business, when from the nature of the parcels that is the appropriate place for their delivery. But there is no rule of law requiring a delivery at the consignee's residence or place of business when he is willing to accept it at a different place, or directs a delivery at another place. The consignee, or his authorized agent, may receive goods addressed to him in the hands of a carrier at any place, either before or after their arrival at their place of destination, and such acceptance operates as a discharge of the carrier from his liability. It was held in Lewis *v.* The Western Railroad, 11 Met. 509, that if A, for whom goods are transported, authorizes B to receive a delivery thereof, and to do all acts incident to the delivery and transportation thereof to A, and B, instead of receiving the goods at the usual place of delivery, requests the agent of the railroad to permit the car which contains the goods to be hauled to a near depot of another company, and such agent assents thereto, and assists B in hauling the car to such depot, and B then requests and obtains leave of that company to use its machinery to remove the goods from the car — the company that transported the goods is not answerable for the want of care or skill in the persons employed in so removing the goods from the car, nor for the want of strength in the machinery used for the removal of them, and cannot be charged with any loss that may happen in the course of such delivery to A.

Had the consignee in this case received the package in question at

the defendants' office, I think no one would doubt the defendants were discharged. The case then turns upon Messenger's agency. If an authorized agent in the premises, a delivery to him was as effectual as a delivery to the principal. The question of agency was a question of fact, and was settled by the verdict of the jury.

We think the delivery at the office of the defendant to the authorized agent of the consignee was proper, and operated to discharge the defendants from their obligations as carriers.

This disposes of the case unless there was some error committed at circuit in submitting the question of Messenger's authority to the jury, or in the court's refusing to charge as requested. I have been unable to discover any such error. The evidence submitted was competent — it was of the most perfect and satisfactory kind, and not only justified, but required the verdict rendered. The judgment should be affirmed.[1]

[1] DAVIES, J., dissenting.

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The question presented to our consideration in this case is, whether the defendants have performed the service which they undertook. There is no ground for the assumption that the money transmitted by the defendants was the property of the bank. It was sent by the plaintiffs to be deposited with the bank as their property, and there is no reason to infer that it was sent to pay an antecedent debt. There is no proof that any such debt existed, and it might as well be said that the money of any depositor when set aside to be deposited in a bank became the property of the bank and ceased to be that of the depositor. It is placed in the bank for safety, and as a convenient mode of transacting business and for making payments by the depositor, by checks or drafts on the bank. It could be attached and reached as the property of the depositor. The ordinary presumptions applicable to a consignment of property, as to the ownership by the consignee, have no application to the present case. Have the defendants performed the service which they undertook? It is contended on their behalf that they have, because they delivered the package to an agent of the bank, and, as they assume, under such circumstances as would render the bank liable to the plaintiffs for the money transmitted.

It would seem to be a sufficient answer to this defence to say, that such was not the contract made by the defendants with the plaintiffs, and that they have no legal right to make a new contract, or do something which they contend is equivalent to that undertaken to be done by them: there is no pretence that the plaintiffs were parties to any such modification of the contract, made or had any knowledge of it, or in any manner assented to it. Nor can it be alleged that the custom of the defendants in delivering packages to the parties, at places other than the bank, can have any effect on the rights of the plaintiffs. As between the defendants and the bank it has significance: as to the parties of the contract, it is *res inter alios acta*, and the plaintiffs are not deprived of any of their rights by reason of it. It is well settled, that it is the duty of the carrier, not only to transport the goods safely to the place of delivery, but without any demand upon him to deliver the same according to the owners' directions. There is no question that in this case the directions of the owners, the plaintiffs, were to deliver this money at the bank, at 173 Canal Street, to the officers of the bank. It was held in Hyde *v.* Trent and Jersey Navigation Company (5 T. R., 389 [260]), that a delivery to a porter at an inn, to carry to the consignee, did not discharge the carrier. That the goods continued at the risk of the carrier until a personal delivery at the house or place of deposit of the consignee, and that the porter to whom the package was delivered, was the servant of the carrier. It would follow in the present

BAILEY *v.* HUDSON RIVER R. CO.

49 N. Y. 70. 1872.

Appeal from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of plaintiffs entered upon a verdict.

Action for the conversion of eleven cases of dry goods.

Church, C. J. It is undisputed that Alden, Frink & Weston delivered the goods in question to the defendant, to be transported by them to the plaintiffs; that they were consigned to the plaintiffs, and the packages properly marked with the name of the plaintiffs' firm, and the defendant gave a receipt for the same, agreeing to deliver the goods safely to the plaintiffs at the city of New York. It is also undisputed that the plaintiffs had made a specific advance upon a portion of the goods, and the remainder were shipped in pursuance of an agreement between the plaintiffs and Alden, Frink & Weston, to pay for money borrowed by the latter of the former a few days previous, and that invoices of all the goods, stating the consignment and shipment by the defendant's railroad, had been forwarded to the plaintiffs by mail. This was substantially the condition of things on the 17th of October, when one of the members of the firm of Alden, Frink & Weston, for his individual benefit, but in the name of his firm, changed the destination of the goods, and the defendant delivered them in pursuance of such changed destination to another person. The question is whether the title had vested in the plaintiffs. I think it had. It is clear that the consignors delivered the goods to the carrier for the plaintiffs in

case that Messenger, the porter to whom the defendants delivered the package in this instance, is to be regarded as the servant of the defendants. *Prima facie*, the carrier is under an obligation to deliver the goods to the consignee personally at the place of delivery. Custom of so general and universal a character as may warrant the supposition that the parties contracted with reference to it, may be proven to vary the manner of the delivery; or the place and manner of the delivery may be varied by the assent of the owner of the property; and where he interferes to control or direct in the matter, he assumes the responsibility. Edwards on Bail., pp. 515, 519. In this case no general or universal custom changing the carrier's legal liability, of such a character as that we may presume the parties to have contracted in reference to it, was shown or pretended. Neither was it alleged that the owners, the plaintiffs, had by their assent in any manner varied the carrier's legal liability, or interfered in any way with the delivery or had any knowledge of the practice of the defendants in making deliveries different from that contained in the direction or contract, or had given any consent to any other delivery or to any change of the legal liabilities assumed by the carrier on receipt of the package. The arrangement alleged to be made between the defendants and the bank or its officers, by which a different delivery was made than that contained in the contract with the plaintiffs, can therefore have no binding effect upon the plaintiffs, or in any manner impair or affect their rights.

compliance with their contract to do so. The parol contract was thereby executed, and the title vested in the plaintiffs. The plaintiffs occupied the legal position of vendees after having paid the purchase-money and received the delivery of the goods. But it is unnecessary, in order to uphold this judgment, to maintain that the plaintiffs occupied strictly the relation of vendees. The legal rights of the vendee attach when goods are shipped to a commission merchant, who has made advances upon them in pursuance of an agreement between the parties. Such an agreement may be either inferred from the circumstances or shown by express contract. Holbrook *v.* Wight, 24 Wend. 169; Haille *v.* Smith, 1 Bos. & Pul. 563. In the latter case, Eyre, J., said: "From the moment the goods were set apart for this particular purpose, why should we not hold the property in them to have changed, it being in perfect conformity to the agreement and such an execution thereof as the justice of the case requires?" The same principle has been repeatedly adopted. Grosvenor *v.* Phillips, 2 Hill, 147.

It must appear that the delivery was made with the intent to transfer the property. Until this is done the parol agreement is executory, the title remains in the consignor, and he has the power to transfer the property to whomsoever he pleases, and render himself liable for the non-performance of the contract. It is urged by the counsel for the defendant that no bill of lading was forwarded or delivered to the plaintiffs, and that until this was done the title remained in the consignors. This is undoubtedly true in many cases; but it is mainly important in characterizing the act of the shipper, and showing with what purpose and intent the goods were delivered to the carrier. If A has property, upon which he has received an advance from B upon an agreement that he will ship it to B to pay the advance or to pay any indebtedness, he may or may not comply with his contract. He may ship it to C or he may ship it to B upon conditions. As owner he can dispose of it as he pleases. But if he actually ships it to B in pursuance of his contract, the title vests in B upon the shipment. The highest evidence that he has done so is the consignment and unconditional delivery to B of the bill of lading. If the consignor procures an advance upon the bill of lading from a third person, or delivers or indorses the bill of lading to a third person for a consideration, it furnishes equally satisfactory evidence that the property was not delivered to the consignee, for the simple reason that it was delivered to some one else. But I apprehend that if a consignor who had such an agreement retained in his own possession a duplicate of the bill of lading, and notified the consignee by letter that he had shipped the property for him in pursuance of the agreement, or in any other manner the intention thus to ship it was evinced, the title would pass as effectually, as between them, as if he had forwarded the bill of lading. The question whether a subsequent indorsee of the bill of lading for

a valuable consideration could acquire any rights against the consignee, is not involved. As against the consignor the delivery of the property to the carrier, with intent to comply with his contract, vests the title in the consignee. It is largely a question of intention. In Mitchell *v.* Ide, 39 C. S. R. 260, cited by the defendants, Lord Denman said: "The intention of Mackenzie to transfer the property to the plaintiff is unquestionable, and we think that under the circumstances he has carried that intention into effect." And in the Bank of Rochester *v.* Jones, 4 N. Y. 501, this court said: "When the bill of lading has not been delivered to the consignee, *and there is no other evidence of an intention* on the part of the consignor to consign the specific property to him, no lien will attach." In that case the bill of lading was not only not sent to the consignee, but was transferred to the plaintiffs, and money borrowed upon it, and there was no evidence of an intention to consign the flour to the defendant except upon the condition of paying the money so borrowed. It should be observed also that in that case there was no agreement to consign the property to the defendant as security, or in payment of the indebtedness due him from the consignor. Such an agreement, either express or implied, is important, although not conclusive, in showing the intent with which the act was done. In this case there was no other bill of lading than the receipt produced in evidence, and no duplicate was taken; but the intention of Alden, Frink & Weston to transfer this specific property to the plaintiffs, to be applied upon their indebtedness, conclusively appears by the undisputed evidence. 1. By the agreement the day prior to the shipment. 2. By forwarding invoices of the shipment to the plaintiffs. 3. By making the shipment unconditionally. 4. By retaining the receipt given by the defendant, and neither making nor attempting to make any use of it.

These acts were so unequivocal of an intention to transfer the property to the plaintiffs that there remains no room for doubt. The moment these acts were done, the title vested in the plaintiffs, and the consignors were powerless to interfere with the property.

The recent case of the Cayuga County National Bank *v.* Daniels (not reported) was decided against the consignees upon the distinction above referred to. It was held in that case that the consignors did not deliver the property to the carrier with the intention to vest the title in the defendants, except upon condition of paying a draft discounted by the plaintiff, and that the bill of lading was delivered upon that condition, and that on the defendants' refusal to comply with the condition they acquired no right or title to the property, and that the case therefore came within the principle of the Bank of Rochester *v.* Jones, *supra*. Here the intention to vest the title is clear and plain. It is urged that the words "on our account," in the invoices, evinced an intention not to vest the title in the plaintiffs. They can have no such effect in this case, even if standing

alone and unexplained they might have. A bill of lading for which, as between the parties, the invoices were a substitute, can always be explained by parol. It may be shown by parol to have been intended as evidence of an absolute sale, a trust, a mortgage, a pledge, a lien, or a mere agency. 2 Hill, 151; 4 N. Y. 501, and cases cited. The actual agreement and transaction will prevail, and it was proved by two of the members of the firm, and uncontradicted, that the goods were, in fact, shipped in pursuance of the agreement. Besides, these words are not necessarily inconsistent with the agreement. The goods were not purchased absolutely by the plaintiffs at a specified price, but were to be sold and the avails applied. The relation of the plaintiffs was more nearly that of trustee, having the title, and bound to dispose of the property and apply the proceeds in a particular manner, and the consignors were the *cestuis que trust*, having the legal right to enforce the terms of the agreement for their benefit. In this sense the property was shipped on their account, and the agreement is consistent with the meaning of those words. The Statute of Frauds has no application. 1st. There was no sale. 2d. If there was, the consideration was paid. 3d. The property was specified when the agreement was made as being that which had been and was then being shipped, and the plaintiffs agreed to accept that particular property, and the subsequent delivery to the carrier agreed upon was in legal effect a delivery to the plaintiffs. Cross *v.* O'Donnell, 44 N. Y. 661; Stafford *v.* Webb, Lalor's Sup., 217.

The defendant is liable for a *conversion* of the property. It had receipted the property and agreed to transport safely, and deliver it to the plaintiffs. Instead of complying with its contract, it delivered the property to another person by the direction of one who had no more legal authority over the property than a stranger, without the return even of its receipt. The plaintiffs had vested rights which the defendant was bound to respect, and with a knowledge of which it was legally chargeable. 45 N. Y. 49; 6 Hill, 586; 24 Wend. 169; Story on Bailment, 414; 31 N. Y. 490. It was its duty to deliver the property to the real owner. 45 N. Y. 34.

Judgment affirmed with costs.

ARMENTROUT *v.* ST. LOUIS K. C. & N. R. CO.

1 Mo. App. 158. 1876.

Blackwell, J. Plaintiff sues defendant, a common carrier, for breach of contract of affreightment, in not fulfilling its undertaking with plaintiff that it would securely keep and safely carry over its road, from Ottumwa, Iowa, to St. Louis, Missouri, and in reasonable time securely deliver to plaintiff's agent, in St. Louis, 100

boxes of eggs, whereby said eggs were totally lost to plaintiff, as he alleges, to his damage $2,000.

The case was tried by the court, a jury being waived upon the following agreed statement of facts.

Plaintiff bought the 100 boxes of eggs in question of McCullough & Lilburn, at Ottumwa, Iowa, at the price of $1,528.04; he paid $10 in cash, and agreed with McCullough & Lilburn that for the balance of the purchase price they should draw against the shipment on Bussy & Co., at St. Louis, with the bill of lading, or receipt therefor of defendant, attached; of all which defendant had no knowledge.

Bussy & Co. were the commission merchants of plaintiff, to sell said eggs for plaintiff's account on arrival, and had no other interest in said eggs or the proceeds.

That on November 25, 1872, McCullough & Lilburn accordingly delivered said eggs to defendant at Ottumwa, Iowa, and took its bill of lading, or receipt, therefor, which is on file in this cause, and may be read in evidence by plaintiff.

That thereupon George McCullough, one of the firm of McCullough & Lilburn, requested defendant to hold said eggs until ordered by them to be sent forward, the particulars of that transaction being set forth in an affidavit of one Phillipps, as follows: —

"On the morning of November 25, 1872, George McCullough came to my office, in Ottumwa, and requested bill of lading for 100 boxes of eggs, to be shipped to Bussy & Co., St. Louis, and not load till following day. This I refused. The eggs were loaded the same day, November 25th, and George McCullough requested car to be held at their risk until draft was accepted. Afternoon of November 27th he gave order to forward car, which was done on first train, morning of 28th, A.M., car 798."

This request to hold and agreement to take all risk was made verbally.

That on November 25, 1872, said McCullough & Lilburn drew their draft on Bussy & Co., for said sum of $1,518.04, with said bill of lading, or receipt, attached; that the same, with bill of lading, or receipt, attached, were presented to Messrs. Bussy & Co., for acceptance, on November 27, 1872, and the draft was by them accepted, and paid by them on November 30, 1872, and charged to account of plaintiff, as plaintiff and Bussy & Co. had agreed it should be, and said draft is annexed hereto, and may be read in evidence herein.

That on November 28, 1872, McCullough & Lilburn directed defendant to forward the eggs to the consignees, Bussy & Co., at St. Louis, and it was at once done. They arrived at St. Louis at 10 A.M., on Sunday, December 1st, being a reasonable time after being forwarded, and notice of their arrival was given to Bussy & Co. on Monday, December 2d, as soon as could be done after their arrival; and that three days is ample, and the usual time for freight to be carried from Ottumwa to St. Louis.

That Bussy & Co. had sold said eggs, to arrive on November 30th, at the price of $1,641.78, but, owing to the eggs having been frozen, they were sold to the best advantage, for $1,156.62; the said price of $1,641.78 being the usual and market price thereof in St. Louis, and said sale being lost because the eggs were so frozen.

That said eggs were so frozen because of the extreme cold weather on the route, and they would not have been frozen if sent forward on November 25, 1872.

That defendant had no knowledge of the interest of any one in the eggs, other than that of the consignor, except that shown, if any, by the receipt, or bill of lading, and by the affidavit of Phillipps.

That plaintiff, by his commission merchants, Bussy & Co., consignees, paid defendant the freight, $64, on said shipment, on its arrival in St. Louis.

The bill of lading is in the usual form, and sets forth that, on November 25, 1872, the date of the bill, there was received, in good order, at Ottumwa, by defendants, from McCullough & Lilburn, to be delivered to Messrs. Bussy & Co., at 16 South Commercial Street, St. Louis, Missouri, 100 boxes of eggs, marked "M. & L., Ottumwa, Iowa, for Bussy & Co., St. Louis, Missouri."

The court found for defendant. Plaintiff duly excepted; and, his motion for a new trial being overruled, the case is brought here by appeal.

On this statement of facts the plaintiff was, in our opinion, entitled to recover. The delivery to the defendant, under the circumstances stated, vested the goods in the consignee; the defendant was from that moment liable to plaintiff, and its liability was that of a common carrier, and not that of a warehouseman. The goods were injured by an exposure which would not have occurred had the goods been forwarded without delay; and the delay which occasioned the damage was wholly unauthorized by the consignee, or his agent, and occurred at the direction or suggestion of a third party who had no legal right whatever to control the goods.

These principles may be taken to be now well settled, and it is too late to attempt to change them. They are also consonant with common-sense and the recognized customs of trade in this country. A bill of lading is taken by the consignor. It is a statement of the carrier to the effect that he has received a certain weight or quantity of a certain description of merchandise, to be forwarded with all reasonable despatch to a certain person named in the bill. To this bill of lading is attached, as in this instance, a draft on the consignee for the value of the goods, which is forwarded by the shipper to his agent at the point of consignment, for presentation to the consignee for acceptance and payment. This draft and bill of lading attached arrive, in the course of mail, before the goods, and are the assurance of the consignee that the goods are on the way. On the faith of the bill of lading he accepts and pays the draft. It is,

therefore, conclusive on the carrier as to persons who have acted on the faith of his contract, and he will not be allowed to modify it without their consent. Any other rule would be destructive of commerce. What commission merchant would be safe in accepting drafts drawn against shipments; what bank would take bills of lading as collaterals, and make the necessary advance upon them, if the shipper, at will, could forward the bill of lading and detain the goods? If the carrier, in this instance, could have detained the goods at the request of the consignor, after the bill of lading was out, until the draft was heard from, he might, with equal safety to himself, have given back the goods to the shipper after the acceptance of the draft by the consignee. The vendor, in the case stated, had no such rights over these goods as he attempted to exercise. From the moment they were received by the carrier he parted with all right to control them in any way, except the right to stop them, before they reached their destination, in the sole case of the insolvency of the consignee.

There was something said in argument as to this being a case of injury by the act of God. The severe cold which injured the eggs could not have been prevented, nor, perhaps, foreseen, by man; but, if the carrier had done his duty, the goods would have arrived at their destination before the frost. The carrier is liable for a loss arising from an inevitable necessity existing at the time of the loss, if guilty of previous misconduct or negligence by which the exposure which resulted in the loss was occasioned.

For the reason stated the judgment of the court below must be reversed. But, inasmuch as every fact necessary to a final judgment in favor of plaintiff would appear to be fully set out in the agreed statement of facts, it does not seem necessary to remand the cause for a new trial, and we accordingly give judgment here for plaintiff for $721, being the difference between the amount for which the eggs were sold to best advantage, on their arrival, and the sale which was lost by the default of defendant, after adding thereto interest from the date of the commencement of the suit to the entry of judgment here. The other judges concur.

McENTEE v. NEW JERSEY STEAMBOAT CO.

45 N. Y. 34. 1871.

Action for the conversion of goods, brought by McEntee against the New Jersey Steamboat Company. It appeared that defendant, as common carriers, received in 1868, at Albany, several bundles of sash and blinds from one Sayer, addressed to "McEntee," New York. The goods having reached their destination, a demand was

made by plaintiff upon defendant, who refused to deliver them, upon tender of charges. There was conflicting evidence as to what the form of the refusal was; but defendant introduced testimony tending to show that a delivery was offered on condition that plaintiff would produce any paper showing ownership or authority to receive the goods, or his identity as the consignee. The judge ruled that the only question for the jury was whether freight-money was tendered, and charged that, under the circumstances, the company was authorized to deliver the goods to any person calling for them; and that common carriers are not responsible for wrong delivery, and therefore had no right to insist upon any person proving ownership. Verdict was rendered for plaintiff, and judgment thereon affirmed at general term. An appeal was taken by defendant to this court.

ALLEN, J. The defendants were charged for the conversion of the goods upon evidence of a demand and a refusal to deliver them. If the demand was by the person entitled to receive them, and a refusal to deliver was absolute and unqualified, the conversion was sufficiently proved, for such refusal is ordinarily conclusive evidence of a conversion; but, if the refusal was qualified, the question was, whether the qualification was reasonable; and if reasonable and made in good faith, it was no evidence of a conversion. Alexander *v.* Southey, 5 B. & Ald. 247; Holbrook *v.* Wight, 24 Wend. 169; Rogers *v.* Weir, 34 N. Y. 463; Mount *v.* Derick, 5 Hill, 455. If, at the time of the demand, a reasonable excuse be made in good faith for the non-delivery, the goods being evidently kept with a view to deliver them to the true owner, there is no conversion.

This action is not upon the contract of the carriers, but for a tortious conversion of the property; but the rights and duties of the defendants as carriers are, nevertheless, involved.

The defendants were bailees of the property, under an obligation to deliver it to the rightful owner. They would have been liable had they delivered the goods to the wrong person. Common carriers deliver property at their peril, and must take care that it is delivered to the right person, for if the delivery be to the wrong person, either by an innocent mistake or through fraud of third persons, as upon a forged order, they will be responsible, and the wrongful delivery will be treated as a conversion. Hawkins *v.* Hoffman, 6 Hill, 586; Powell *v.* Myers, 26 Wend. 290; Devereux *v.* Barclay, 2 B. & Ald. 702; Guillaume *v.* Hamburgh and Am. Packet Co., 42 N. Y. 212; Duff *v.* Budd, 3 Brod. and Bing. 177. The duties of carriers may be varied by the differing circumstances of cases as they arise; but it is their duty in all cases to be diligent in their efforts to secure a delivery of the property to the person entitled, and they will be protected in refusing delivery until reasonable evidence is furnished them that the party claiming is the party entitled, so long as they act in good faith and solely with a view to

a proper delivery. The circumstances of this case, the very defective address of the parcels, and the omission of the plaintiff to produce any evidence of title to the property or identifying him as the consignee, justified the defendants in exercising caution in the delivery, and it should have been submitted to the jury whether the refusal was qualified, as alleged by the defendants; and if so, whether the qualification was reasonable, and was the true reason for not delivering the goods. The judge also erred in his instructions to the jury as to the duty of the defendants, as common carriers, in the delivery of goods. They may not properly, or without incurring liability to the true owner, deliver goods to any person who calls for them, other than the rightful owner. The judgment must be reversed and a new trial granted, costs to abide event.

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c. *Delivery to Holder of Bill of Lading.*

PENNSYLVANIA R. CO. *v.* STERN & SPIEGEL.

119 Penn. St. 24. 1888.

Mr. Justice Paxson. The only error assigned is to the charge of the court. It was in substance that the defendant company could only deliver the merchandise upon the production of the bill of lading, and that as there was nothing to excuse delivery without a compliance with the terms, the jury should find for the plaintiffs.

We see no error in this. The plaintiffs shipped this car-load of dry bones from Bay City, Michigan, to Landenburg, Chester Co., Penn., consigned to themselves. At the same time they drew on Whann for the amount, at forty-five days. There was a bill of lading attached to the draft showing that Stern & Spiegel, the shippers, had consigned said car to themselves. The letter of the latter to Whann, and the invoice, both of which were shown to the agent of the defendant company at Landenburg, were notice that there was a draft and bill of lading, and that Whann was required to protect the draft. The agent delivered the car to Whann without the bill of lading, and without an acceptance of the draft. This he had no right to do. The title to the property remained in the consignors until delivery in accordance with the conditions. Bills of lading are symbols of property, and when properly indorsed operate as a delivery of the property itself, investing the indorsers with a constructive custody, which serves all the purposes of an actual possession, and so continues until there is a valid and complete delivery of the property under and in pursuance of the bill of lading, and to the persons entitled to receive the same. Hesskell *v.* National Bank,

91 U. S. 618. There could be no delivery except in accordance with the bill of lading. Dows *v.* Milwaukee Bank, 91 U. S. 618; Stollenwerck *v.* Thatcher, 115 Mass. 224. The invoice standing alone furnishes no proof of title: Benjamin on Sales, sec. 332; Dows *v.* Milwaukee Bank, *supra.*

It was argued, however, that there was a course of dealing between the parties that would take the case out of the rule above stated. The attention of the court below does not appear to have been called to this matter upon the trial. No reference to it is to be found in the charge, nor was any point submitted which would call it forth. There was evidence that the defendant company had on more than one occasion delivered goods from the shippers to Whann prior to the acceptance of the drafts. No harm came of this because the drafts were afterwards accepted and paid. But this course of dealing between the company and Whann was not brought home to the knowledge of the plaintiffs in a way that would justify the jury in finding that they had acquiesced in such an arrangement, and that they had consented to the delivery of this particular carload without the production of the bill of lading and acceptance of the draft. The company delivered in their own wrong and assumed the risk.

Nor can we say as matter of law that plaintiffs suffered no loss by reason of the improper delivery. If the draft had been accepted it might have been paid, notwithstanding the failure of Whann, or the plaintiffs might have sold it without recourse.

Judgment affirmed.[1]

WEYAND *v.* ATCHISON, T. & S. F. R. CO.

75 Iowa, 573. 1888.

This is an action aided by attachment, brought to recover the value of a quantity of canned goods, shipped by the Elgin, Iowa, Canning Company to Pueblo, Colorado, and alleged to have been delivered

[1] It is no excuse for a delivery to the wrong persons that the indorsee of the bills of lading was unknown, if indeed he was, and that notice of the arrival of the [goods] could not be given. Diligent inquiry for the consignee, at least, was a duty, and no inquiry was made. Want of notice is excused when a consignee is unknown, or is absent, or cannot be found after diligent search. Fisk *v.* Newton, 1 Denio, 45; Peytona, 2 Curtis, 21. And if, after inquiry, the consignee or the indorsee of a bill of lading for delivery to order cannot be found, the duty of the carrier is to retain the goods until they are claimed, or to store them prudently for and on account of their owner. He may thus relieve himself from a carrier's responsibility. Galloway *v.* Hughes, 1 Bailey, 553; 1 Conklin's Admiralty, 196; Fisk *v.* Newton, *supra.* He has no right under any circumstances to deliver to a stranger. Justice Strong, in The Thames, 14 Wall. 98.

to a person not entitled to receive the same, through the fault of defendant. The cause was tried to the court, and a judgment rendered in favor of the plaintiff for the amount admitted to be the value of the goods in controversy, and sustaining the attachment. Defendant appeals. On the first submission of this cause a decision was rendered by this court reversing the judgment of the Superior Court. A rehearing was ordered on the petition of appellee, and the cause again submitted.

ROBINSON, J. Plaintiff is the trustee of the Elgin, Iowa, Canning Company. Defendant is a corporation organized and existing under the laws of the State of Kansas, and engaged in operating a line of railway from Kansas City through the States of Kansas and Colorado, and to the city of Pueblo, in the last-named State. At the time this cause was tried in the court below, defendant had never owned nor operated any railway within the State of Iowa. In October, 1884, one Evans, of Pueblo, ordered of the canning company the goods in controversy. Not being acquainted with Evans, and not wishing to sell the goods on credit, it delivered them, marked and consigned to itself at Pueblo, to a railway company at Elgin, Iowa. From that company the canning company took two receipts or bills of lading, which were, in fact, duplicates, but neither showed that the other had been issued. The canning company drew a draft on Evans, through a bank in Pueblo, for the price of the goods, and sent to the bank an order on defendant to deliver the goods to Evans. The draft and order were sent together to the bank, with instructions to deliver the order to Evans upon payment by him of the draft. At the same time the canning company sent to Evans one of the bills of lading, instructing him that the goods had been shipped, and that he was to pay the draft and obtain the order. The bill of lading sent to Evans was not signed nor indorsed by the canning company. In due time the goods were transferred by the railway company which first received them to defendant, and were by it transferred to Pueblo. Evans never paid the draft nor obtained the order, but within twenty-four hours after the arrival of the goods in Pueblo he presented the bill of lading which he had received to defendant, and without other authority obtained the goods. At that time Evans was insolvent, but defendant had no knowledge of that fact, nor that the goods had not been paid for, nor that a draft and order had been sent or instructions given in regard to the goods, but delivered them in good faith. . . .

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II. Appellant insists that it was not in fault in delivering the goods to Evans, for the reason that the delivery to him of the bill of lading was in effect an assignment of the goods, and invested him with a right to demand and receive them. We are referred to many authorities which are claimed to support this view. One of these is Merchants' Bank v. Union Ry. & Trans. Co., 69 N. Y. 374. An

examination of that case and the cases therein cited will show that what the court really decided was that a delivery of the forwarder's receipt without assignment, but with intent that the title to the goods for which it was given, or an interest therein, should be thereby transferred, would be effectual to accomplish the transfer intended. Other authorities cited by appellant are to the same effect. In this case it was the intention of the canning company to retain the title and right of possession in itself until the price of the goods should be paid. The bill of lading required the delivery of the goods to the consignor. It did not provide for delivery to bearer or order, but to the Elgin Canning Company. Therefore it is clear that the forwarding of the bill of lading to Evans, with directions to pay the draft and obtain the order for the goods, did not invest him with any right to the goods as against the consignor. But it is said that defendant was justified in delivering the goods to Evans because of his possession of the bill of lading. The cases of Lickbarrow *v.* Mason, 1 Smith, Lead. Cas. *838, with annotations; Dows *v.* Green, 24 N. Y. 638; Allen *v.* Williams, 12 Pick. 297, and others, are cited in support of this claim. It is true that statements were made in some, if not all, of those cases which, considered apart from the connection in which they are found, might seem to sustain the claim; but when they are considered in connection with the facts of the cases where found, and the general conclusions of the court which made them, we think they go no further than to hold that the delivery of an unindorsed bill of lading would be a good symbolical delivery of the goods it represented, where such was the intent and purpose of the parties. In Fearon *v.* Bowers, reported in 1 Smith, Lead. Cas. *782, cited by appellant, the consignor had sent two bills of lading, one of which was indorsed to one person and the other to another, and the court held that a delivery might be made to the holder of either bill. That case has but little relation to the principle involved in this. Appellant insists that the bill of lading is like a promissory note, in that possession is *prima facie* evidence of ownership; but we do not think that such is the case. A bill of lading is a non-negotiable instrument. Garden Grove Bank *v.* Humeston & S. Ry. Co., 67 Iowa, 534. The following language is pertinent: "Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. . . . They are in commerce a very different thing from bills of exchange and promissory notes, answering a different purpose and performing a different function." Also: "It is not a representative of money, used for transmission of money or for the payments of debts or for purchases. It does not pass from hand to hand as bank-notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it, — a representative of those goods; but if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a *bona fide* pur-

chaser for value, will divest the ownership of the person who lost them, or from whom they were stolen." Shaw *v.* Railroad Co., 101 U. S. 557. See, also, Hutch. Carr. sec. 348. In 2 Pars. Cont. 292, it is said: "The consignor frequently sends to a consignee a bill not indorsed, and then sends to his own agent in or within reach of the same port an indorsed bill,—it may be indorsed in blank, or to the agent, or to the party ordering the goods,—and the consignor sends to his agent with the bill orders to deliver the bill to the party ordering the goods, or to receive the goods and deliver them to him, provided payment be made or secured, or such other terms as the consignor prescribes are complied with. This course secures to the consignor, beyond all question, the right and power of retaining the goods until the price for them is paid or secured to him." This is not only in point, but seems to be sound in principle. The fact that Evans presented the bill of lading in this case was not sufficient to overcome the presumption which the terms of the bill raised, that the consignor was the owner of the goods. That such is the presumption is well established. Congar *v.* Galena, U. Ry. Co., 17 Wis. 485; Krulder *v.* Ellison, 47 N. Y. 37; Lawrence *v.* Minturn, 17 How. 100; Alderman *v.* Eastern Ry. Co., 115 Mass. 234. See, also, Tuttle *v.* Becker, 47 Iowa, 486; 1 Benj. Sales, secs. 577, 579; 2 Amer. & Eng. Cyclop. Law, 242, 243. The contract with the canning company required the defendant to deliver the goods to the consignor. The unindorsed bill of lading presented by Evans was evidence that the contract was still in force, and that the canning company was then the owner of the goods. The delivery to Evans was not authorized, and was made by defendant at its own risk. Hutch. Carr. secs. 129, 130, 344. But it is said that the canning company clothed Evans with the apparent right to demand the goods, and that, since "one of two innocent parties must suffer a loss from the wrong of another, the loss should fall upon the party who put it in the power of that other to perpetrate the wrong." This case does not fall within that rule, for, as we have seen, the possession of the bill of lading, without indorsement or other evidence of an assignment, did not vest Evans with any apparent right to the property. The loss resulted from the negligence of defendant in not insisting upon proper evidence of an assignment before it surrendered the goods.

III. It is insisted by appellant that the delivery to Evans was made in accordance with the custom at Pueblo, and that the contract of shipment must have been made with reference to that custom. The Superior Court found that by a local custom at Pueblo goods shipped over railway lines to that place were delivered to the person who held the bills of lading, but that the custom was not general, and plaintiff had no knowledge of it. The contract of shipment required defendant to deliver the goods to the canning company, and we question the right of defendant to vary this by showing a

custom in conflict with it. The contract was not ambiguous, and required no explanation. But where a custom may be shown it must appear that it was so general that the parties to the contract will be presumed to have contracted with reference to it. Couch *v.* Watson Coal Co., 46 Iowa, 20; Berkshire Woolen Co. *v.* Procter, 7 Cush. 422; Fay *v.* Insurance Co., 16 Gray, 461; Wilson *v.* Bauman, 80 Ill. 494; 2 Greenl. Ev. sec. 251. The court below not only found that the custom pleaded was local, but that plaintiff had no knowledge of it. How the knowledge of plaintiff would affect the contract does not appear, but knowledge on the part of the canning company when the shipping receipt was taken is not pleaded nor is it shown. Therefore this defence is not maintained. Walls *v.* Bailey, 49 N. Y. 473; Higgins *v.* Moore, 34 N. Y. 425; North Penn. Ry. Co. *v.* Commercial Bank, 123 U. S. 727; 8 Sup. Ct. Rep. 266; Clarke's Browne, Usages & Cust. 134, note 4. The further examination which we have given this case on rehearing leads us to conclude that the first decision of this court was erroneous. The judgment of the Superior Court is

Affirmed.

SHAW *v.* RAILROAD CO.

101 U. S. 557. 1879.

Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This is an action of replevin brought by the Merchants' National Bank of St. Louis, Missouri, against Shaw & Esrey, of Philadelphia, Pennsylvania, to recover possession of certain cotton, marked "W D I." One hundred and forty-one bales thereof having been taken possession of by the marshal were returned to the defendants upon their entering into the proper bond. On Nov. 11, 1874, Norvell & Co., of St. Louis, sold to the bank their draft for $11,947.43 on M. Kuhn & Brother, of Philadelphia, and, as collateral security for the payment thereof indorsed in blank and delivered to the bank an original bill of lading for one hundred and seventy bales of cotton that day shipped to the last-named city. The duplicate bill of lading was on the same day forwarded to Kuhn & Brother by Norvell & Co. The Merchants' Bank forwarded the draft, with the bill of lading thereto attached, to the Bank of North America. On November 14, the last-named bank sent the draft — the original bill of lading still being attached thereto — to Kuhn & Brother by its messenger for acceptance. The messenger presented the draft and bill to one of the members of that firm, who accepted the former,

but, without being detected, substituted the duplicate for the original bill of lading.

On the day upon which this transaction occurred, Kuhn & Brother indorsed the original bill of lading to Miller & Brother, and received thereon an advance of $8,500. Within a few days afterwards, the cotton, or rather that portion of it which is in controversy, was, through the agency of a broker, sold by sample with the approval of Kuhn & Brother to the defendants, who were manufacturers at Chester, Pennsylvania. The bill of lading, having been deposited on the same day with the North Pennsylvania Railroad Company, at whose depot the cotton was expected to arrive, it was on its arrival delivered to the defendants.

The fact that the Bank of North America held the duplicate instead of the original bill of lading was discovered for the first time on the 9th of December, by the president of the plaintiff, who had gone to Philadelphia in consequence of the failure of Kuhn & Brother and the protest of the draft.

The defendants below contended that the bill of lading was negotiable in the ordinary sense of that word; that Miller & Brother had purchased it for value in the usual course of business, and that they thereby had acquired a valid title to the cotton, which was not impaired by proof that Kuhn & Brother had fraudulently got possession of the bill; but the court left it to the jury to determine, —

1st, Whether there was any negligence of the plaintiff or its agents in parting with possession of the bill of lading.

2d, Whether Miller & Brother knew any fact or facts from which they had reason to believe that the bill of lading was held to secure payment of an outstanding draft.

The jury having found the first question in the negative and the second in the affirmative, further found "the value of the goods eloigned" to be $7,015.97, assessed the plaintiff's damages at that sum with costs, for which amount the court entered a judgment. Shaw & Esrey thereupon sued out this writ of error.

Mr. Justice Strong. The defendants below, now plaintiffs in error, bought the cotton from Miller & Brother by sample, through a cotton broker. No bill of lading or other written evidence of title in their vendors was exhibited to them. Hence, they can have no other or better title than their vendors had.

The inquiry, therefore, is, what title had Miller & Brother as against the bank, which confessedly was the owner, and which is still the owner, unless it has lost its ownership by the fraudulent act of Kuhn & Brother. The cotton was represented by the bill of lading given to Norvell & Co., at St. Louis, and by them indorsed to the bank, to secure the payment of an accompanying discounted time-draft. That indorsement vested in the bank the title to the cotton, as well as to the contract. While it there continued, and during the transit of the cotton from St. Louis to Philadelphia, the

indorsed bill of lading was stolen by one of the firm of Kuhn & Brother, and by them indorsed over to Miller & Brother, for an advance of $8,500. The jury has found, however, that there was no negligence of the bank, or its agents, in parting with possession of the bill of lading, and that Miller & Brother knew facts from which they had reason to believe it was held to secure the payment of an outstanding draft; in other words, that Kuhn & Brother were not the lawful owners of it, and had no right to dispose of it.

It is therefore to be determined whether Miller & Brother, by taking the bill of lading from Kuhn & Brother under these circumstances, acquired thereby a good title to the cotton as against the bank.

In considering this question, it does not appear to us necessary to inquire whether the effect of the bill of lading in the hands of Miller & Brother is to be determined by the law of Missouri, where the bill was given, or by the law of Pennsylvania, where the cotton was delivered. The statute of both States enact that bills of lading shall be negotiable by indorsement and delivery. The statute of Pennsylvania declares simply, they "shall be negotiable and may be transferred by indorsement and delivery;" while that of Missouri enacts that "they shall be negotiable by written indorsement thereon and delivery, *in the same manner* as bills of exchange and promissory notes." There is no material difference between these provisions. Both statutes prescribe the manner of negotiation; *i.e.*, by indorsement and delivery. Neither undertakes to define the effect of such a transfer.

We must, therefore, look outside of the statute to learn what they mean by declaring such instruments negotiable. What is negotiability? It is a technical term derived from the usage of merchants and bankers, in transferring, primarily, bills of exchange and, afterwards, promissory notes. At common law no contract was assignable, so as to give to an assignee a right to enforce it by suit in his own name. To this rule bills of exchange and promissory notes, payable to order or bearer, have been admitted exceptions, made such by the adoption of the law merchant. They may be transferred by indorsement and delivery, and such a transfer is called negotiation. It is a mercantile business transaction, and the capability of being thus transferred, so as to give to the indorsee a right to sue on the contract in his own name, is what constitutes negotiability. The term "negotiable" expresses, at least primarily, this mode and effect of a transfer.

In regard to bills and notes, certain other consequences generally, though not always, follow. Such as a liability of the indorser, if demand be duly made of the acceptor or maker, and seasonable notice of his default be given. So if the indorsement be made for value to a *bona fide* holder, before the maturity of the bill or note, in due course of business, the maker or acceptor cannot set up

against the indorsee any defence which might have been set up against the payee, had the bill or note remained in his hands.

So, also, if a note or bill of exchange be indorsed in blank, if payable to order, or if it be payable to bearer, and therefore negotiable by delivery alone, and then be lost or stolen, *bona fide* purchaser for value paid acquires title to it, even as against the true owner. This is an exception from the ordinary rule respecting personal property. But none of these consequences are necessary attendants or constituents of negotiability, or negotiation. That may exist without them. A bill or note past due is negotiable, if it be payable to order, or bearer, but its indorsement or delivery does not cut off the defences of the maker or acceptor against it, nor create such a contract as results from an indorsement before maturity, and it does not give to the purchaser of a lost or stolen bill the rights of the real owner.

It does not necessarily follow, therefore, that because a statute has made bills of lading negotiable by indorsement and delivery, all these consequences of an indorsement and delivery of bills and notes before maturity ensue or are intended to result from such negotiation.

Bills of exchange and promissory notes are exceptional in their character. They are representatives of money, circulating in the commercial world as evidence of money, "of which any person in lawful possession may avail himself to pay debts or make purchases or make remittances of money from one country to another, or to remote places in the same country. Hence, as said by Story, J., it has become a general rule of the commercial world to hold bills of exchange, as in some sort, sacred instruments in favor of *bona fide* holders for a valuable consideration without notice." Without such a holding they could not perform their peculiar functions. It is for this reason it is held that if a bill or note, indorsed in blank, or payable to bearer, be lost or stolen, and be purchased from the finder or thief, without any knowledge of want of ownership in the vendor, the *bona fide* purchaser may hold it against the true owner. He may hold it though he took it negligently, and when there were suspicious circumstances attending the transfer. Nothing short of actual or constructive notice that the instrument is not the property of the person who offers to sell it — that is, nothing short of *mala fides* — will defeat his right. The rule is the same as that which protects the *bona fide* indorser of a bill or note purchased for value from the true owner. The purchaser is not bound to look beyond the instrument. Goodman *v.* Harvey, 4 Ad. & E. 870; Goodman *v.* Simonds, 20 How. 343; Murray *v.* Lardner, 2 Wall. 110; Matthews *v.* Poythress, 4 Ga. 287. The rule was first applied to the case of a lost bank-note (Miller *v.* Race, 1 Burr. 452), and put upon the ground that the interests of trade, the usual course of business, and the fact that bank-notes pass from hand to hand as coin, require it.

It was subsequently held applicable to merchants' drafts, and in Peacock *v.* Rhodes, 2 Doug. 633, to bills and notes, as coming within the same reason.

The reason can have no application to the case of a lost or stolen bill of lading. The function of that instrument is entirely different from that of a bill or note. It is not a representative of money, used for transmission of money, or for the payment of debts or for purchases. It does not pass from hand to hand as bank-notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it, — a representative of those goods. But if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a *bona fide* purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen. Why then should the sale of the symbol or mere representative of the goods have such an effect? It may be that the true owner, by his negligence or carelessness, may have put it in the power of a finder or thief to occupy ostensibly the position of a true owner, and his carelessness may estop him from asserting his right against a purchaser who has been misled to his hurt by that carelessness. But the present is no such case. It is established by the verdict of the jury that the bank did not lose its possession of the bill of lading negligently. There is no estoppel, therefore, against the bank's right.

Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable *in the same manner* as bills of exchange and promissory notes are negotiable, intended to change totally their character, and put them *in all respects* on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange if not impossible, — such as the liability of indorsers, the duty of demand *ad diem*, notice of non-delivery by the carrier, etc., or the loss of the owner's property by fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement. No statute is to be construed as altering the common law farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange not to be inferred from words that can be fully satisfied without it.

The law has most carefully protected the ownership of personal property, other than money, against misappropriation by others than the owner, even when it is out of his possession. This protection would be largely withdrawn if the misappropriation of its symbol or representative could avail to defeat the ownership, even when the person who claims under a misappropriation had reason to believe that the person from whom he took the property had no right to it.

We think, therefore, that the rule asserted in Goodman *v.* Harvey, Goodman *v.* Simonds, Murray *v.* Lardner, *supra*, and in Phelan *v.* Moss, 67 Pa. St. 59, is not applicable to a stolen bill of lading. At least the purchaser of such a bill, with reason to believe that his vendor was not the owner of the bill, or that it was held to secure the payment of an outstanding draft, is not a *bona fide* purchaser, and he is not entitled to hold the merchandise covered by the bill against its true owner. In the present case there was more than mere negligence on the part of Miller & Brother, more than mere reason for suspicion. There was reason to believe Kuhn & Brother had no right to negotiate the bill. This falls very little, if any, short of knowledge. It may fairly be assumed that one who has reason to believe a fact exists, knows it exists. Certainly, if he be a reasonable being.

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Judgment affirmed.

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d. *Delivery to True Owner.*

THE IDAHO.

93 U. S. 575. 1876.

Mr. Justice Strong. In determining the merits of the defence set up in this case, it is necessary to inquire whether the law permits a common carrier to show, as an excuse for non-delivery pursuant to his bill of lading, that he has delivered the goods upon demand to the true owner. Upon this subject there has been much debate in courts of law, and some contrariety of decision.

In Rolle's Abr. 606, tit. "Detinue," it is said, "If the bailee of goods deliver them to him who has the right to them, he is, notwithstanding, chargeable to the bailor, who, in truth, has no right;" and for this, 9 Henry VI. 58, is cited. And so, if the bailee deliver them to the bailor in such a case, he is said not to be chargeable to the true owner, id. 607, for which 7 Henry VI. 22, is cited. The reasons given for such a doctrine, however satisfactory they may have been when they were announced, can hardly command assent now. It is now everywhere held, that, when the true owner has by legal proceedings compelled a delivery to himself of the goods bailed,

such delivery is a complete justification for non-delivery, according to the directions of the bailor. Bliven *v.* Hudson River Railroad Co., 36 N. Y. 403 [**364**]. And so, when the bailee has actually delivered the property to the true owner, having a right to the possession, on his demand, it is a sufficient defence against the claim of the bailor. The decisions are numerous to this effect. King *v.* Richards, 6 Whart. 418; Bates *v.* Stanton, 1 Duer, 79; Hardman *v.* Wilcock, 9 Bing. 382; Biddle *v.* Bond, 6 Best & S. 225. If it be said, that, by accepting the bailment, the bailee has estopped himself against questioning the right of his bailor, it may be remarked in answer, that this is assuming what cannot be conceded. Undoubtedly the contract raises a strong presumption that the bailor is entitled; but it is not true that thereby the bailee conclusively admits the right of the principal. His contract is to do with the property committed to him what his principal has directed, — to restore it, or to account for it. Cheeseman *v.* Exall, 6 Exch. 341. And he does account for it when he has yielded it to the claim of one who has right paramount to that of his bailor. If there be any estoppel, it ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount; that is, by the reclamation of possession by the true owner. Biddle *v.* Bond, *supra*. Nor can it be maintained, as has been argued in the present case, that a carrier can excuse himself for failure to deliver to the order of the shipper, only when the goods have been taken from his possession by legal proceedings, or where the shipper has obtained the goods by fraud from the true owner. It is true, that, in some of the cases, fraud of the shipper has appeared; and it has sometimes been thought it is only in such a case, or in a case where legal proceedings have interfered, that the bailee can set up the *jus tertii*. There is no substantial reason for the opinion. No matter whether the shipper has obtained the possession he gives to the carrier by fraud practised upon the true owner, or whether he mistakenly supposes he has rights to the property, his relation to his bailee is the same. He cannot confer rights which he does not himself possess; and if he cannot withhold the possession from the true owner, one claiming under cannot. The modern and best-considered cases treat as a matter of no importance the question how the bailor acquired the possession he has delivered to his bailee, and adjudge, that, if the bailee has delivered the property to one who had the right to it as the true owner, he may defend himself against any claim of his principal. In the late case of Biddle *v.* Bond, *supra*, decided in 1865, it was so decided; and Blackburn, J., in delivering the opinion of the court, said there was nothing to alter the law on the subject in the circumstance that there was no evidence to show the plaintiff, though a wrong-doer, did not honestly believe that he had the right. Said he, the position of the bailee is precisely the same, whether his bailor was honestly mistaken as to

the rights of the third person whose title is set up, or fraudulently acting in derogation of them. In Western Transportation Company v. Barker, 56 N. Y. 544, the Court of Appeals of New York unanimously asserted the same doctrine, saying, "The best-decided cases hold that the right of a third person to which the bailee has yielded may be interposed in all cases as a defence to an action brought by a bailor subsequently for the property. When the owner comes and demands his property, he is entitled to its immediate delivery, and it is the duty of the possessor to make it. The law will not adjudge the performance of this duty tortious as against a bailor having no title." The court repudiated any distinction between a case where the bailor was honestly mistaken in believing he had the right, and one where a bailor obtained the possession feloniously or by force or fraud; and we think no such distinction can be made.

We do not deny the rule that a bailee cannot avail himself of the title of a third person (though that person be the true owner) for the purpose of keeping the property for himself, nor in any case where he has not yielded to the paramount title. If he could, he might keep for himself goods deposited with him, without any pretence of ownership. But if he has performed his legal duty by delivering the property to its true proprietor, at his demand, he is not answerable to the bailor. And there is no difference in this particular between a common carrier and other bailees.

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e. *Delivery to Wrong Party through Mistake or Fraud.*

POWELL *v.* MYERS.

26 Wend. (N. Y. Ct. of Errors) 591. 1841.

Error from the Supreme Court. Myers brought an action in the common pleas of New York against Powell and others as common carriers, for the loss of a trunk and its contents, taken on board a steamboat owned by the defendants, at West Point, by a son of the plaintiff, who, at the time, was a minor, and took passage in the boat for New York. The boat usually left Newburg at five o'clock P. M., and arrived at New York between nine and ten the same evening. Shortly before arriving at the dock, a young man named Penyn, who accompanied the plaintiff's son from West Point, in his presence inquired of the master of the boat whether their baggage would be safe on board the boat during the night; who answered that it would be perfectly safe, for they stationed a watch for its protection until morning. Passengers occasionally stayed on board during the night, but usually left the boat on arriving at the city.

Pruyn stayed on board, but the plaintiff's son left the boat soon after its arrival, and on the next morning, at about eight o'clock, went to the boat for his trunk, and then learned that it had been delivered on a forged order. A negro man had come on board and presented an order for the trunk. The master of the boat pointed it out to the negro. Pruyn, who was present, observed that the trunk had been left in his charge. The master of the boat said there was an order for it, when Pruyn said very well, and told the negro to take it. The judge charged the jury that the defendants were responsible for the delivery of the baggage of travellers in their boat, unless lost by inevitable accident; that if the trunk had not been delivered to the passenger, and was not so lost, the defendants remained liable even after the boat arrived at the wharf. To which charge the counsel for the defendants excepted. The jury found a verdict for the plaintiff, on which judgment was rendered: which judgment was affirmed by the Supreme Court on writ of error, on the ground that this case was not distinguishable from those of Hollister *v.* Nowlen, 19 Wendell, 234, and Cole *v.* Goodwin, id. 251. The defendants removed the record into this court by writ of error, where the case was submitted on printed arguments by: —

By the Chancellor. . . . . .

It appears from the testimony, that the boat usually arrived at New York in the night, and though the passengers usually landed with their baggage before morning, they frequently remained on board through the night. The jury therefore were right in concluding that the baggage left on board was in the custody of the master in his capacity of common carrier until it was called for at the usual time in the morning, after his arrival at his place of destination. The owners of the boat, in whose custody the trunk was, were therefore clearly liable for the misdelivery thereof to the colored man, upon the forged order, and were rightfully charged with the loss. Even in the ordinary case of a bank which pays out the money of a depositor upon a forged check, in his name, the institution and not the depositor must sustain the loss. So, too, the warehouseman, who is not liable to the same extent as the common carrier, has been held liable for delivering the goods intrusted to his care to the wrong person, where such delivery was by mistake merely and not intentionally wrong. See Devereux *v.* Barclay, 2 Barn. & Ald. Rep. 702.

For these reasons I think the decisions of the judge who tried the cause and of the Supreme Court were correct, and that the judgment should be affirmed.

AMERICAN EXPRESS CO. *v.* STACK.

29 Ind. 27. 1867.

Gregory, J. Stack sued the appellant for the non-delivery of two bonds. The defendant answered by the general denial, with an agreement between the parties that all legal defence could be given in evidence under it. Trial by the court; finding for the plaintiff; motion for a new trial overruled, and judgment.

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The evidence which is made part of the record tends to show that the plaintiff enlisted as a soldier in the army of the United States, in Lockport, Niagara County, New York, in September, 1864, and received, as a bounty from that county, two hundred dollars in cash and the bonds described in the complaint, which bonds were immediately sent by express to the plaintiff's wife, Hannah Stack, at Chicago, Illinois. In July, 1865, the plaintiff was mustered out of the service near Albany, New York, and arrived home in Chicago on the 16th of that month. A few days before the plaintiff got home his wife appeared at the provost marshal's office in Chicago, and after a conference with Captain James, the provost marshal, she was referred by him to the witness, Eveleth, then a clerk in the office, with a request that he attend to her business. She then exhibited to Eveleth a paper purporting to be a telegram from her husband, James Stack, from number 64 Montgomery Street, Albany, New York, directing her to send those bonds to Albany, New York, 64 Montgomery Street. She handed Eveleth two bonds, answering the description of those in the complaint referred to, who thereupon enclosed them properly and directed the package "To James Stack, 64 Montgomery Street, Albany, N. Y." He also indorsed on the back of the package the amount of the enclosed, and the words "From Mrs. Hannah Stack, Chicago, Illinois." He, at the same time, wrote a letter, in the name of Hannah Stack, to be sent by mail, informing James Stack of the transmission of the bonds by express, and addressed the letter to "James Stack, 64 Montgomery Street, Albany, New York." On the 11th of July, John Staving, then receiving clerk of the United States Express Company at Chicago, received the package and gave a receipt therefor, in which that company undertook to forward the package to the nearest point reached by it, and that the company should only be liable as forwarders. The United States Express Company carried the package to Buffalo, New York (the end of the line), and there delivered it to the appellant. The package reached Albany, New York, on the 14th of July, 1865, and was there delivered, by the duly authorized agent of the defendant, on the 15th (the next day)

to a man representing himself to be James Stack, under these circumstances: On the day of its arrival, the delivery agent of the company called with it at 64 Montgomery Street, which was a hotel, or boarding-house, kept by Lillis, and there found, on inquiry, that Stack was not then in, whereupon the package was returned to the defendant's office. On the morning of the 15th of July, a man called at the office, representing himself to be James Stack, and showed the agent a letter purporting to come from Hannah Stack, from Chicago, informing him (Stack) that the bonds had been sent by express. He was informed by the agent that he must get some one to identify him — that the letter was not enough. The man left the office, and shortly after returned with Lillis. The agent was unacquainted with the latter, and required some one known to him (the agent) to be brought to vouch for Lillis. Slevin was then brought in, who was known to the agent to be a reliable man. Slevin did not know Stack, and so informed the agent, but did know Lillis, and represented him to the agent as all right and reliable. The agent then asked Lillis if the man with him was James Stack, and Lillis replied that he was, and was staying at his (Lillis') house. Lillis was asked no other questions and gave no other information. The man calling himself Stack was asked by the agent, in the presence of Lillis, what the package contained, and the man replied that it contained a bond for $500, and one for $300, Niagara County war bonds, and was from his wife, Hannah Stack, from Chicago. The agent thereupon delivered the package to the supposed Stack. The person to whom the package was delivered was not the real James Stack, but a swindling pretender, who had doubtless sent the false despatch to Stack's wife. The appellee did not send the despatch which his wife got, nor had he any knowledge of its being sent. Lillis had no other knowledge or information about the pretender than this: About a week or ten days before the package was delivered, a man came to his house and said his name was James Stack, and that he was a soldier, stopping at the barracks, then located between Troy and Albany, and asked permission of Lillis for a room to write a letter to his wife, which was given. After the letter was written, he asked Lillis for his address, which was given thus: "James Lillis, 64 Montgomery Street, Albany, New York." Stack said he would have a letter addressed to him at Lillis' house, and requested that if it came it should be kept. After that he called occasionally at Lillis' house and took meals, up to the time the package came; and, in the mean time, a letter came to Lillis' house for him, and he stated to Lillis that the letter came from his wife, and informed him of the sending of a package by express. The agent of the express company, at the time he delivered the package, was not aware of the nature or extent of Lillis' knowledge and acquaintance with the pretender, nor did he ask any question or make any effort to acquire such information.

It is claimed, that, admitting the liability assumed by the appellant to be that of a common carrier, yet that such liability terminated when the package was taken to 64 Montgomery Street, and thereafter the appellant was only bound to ordinary diligence in keeping the package for the owner. It is also urged that the contract entered into between the plaintiff and the United States Express Company is to govern in fixing the liability of the appellant.

It is not necessary, for the determination of this case, that we should pass upon either of these propositions. For in any event the liability of the company could not be less than that of a warehouseman.

In Devereux *et al. v.* Barclay *et al.*, 2 Bar. & Ald. 702, it was held that trover will lie for the misdelivery of goods by a warehouseman, although such misdelivery has occurred by mistake only. Nor will a delivery on a forged order protect the warehouseman. Lubbock *v.* Inglis, 1 Starkie, 104 (2 En. Com. L. 215).

The court below found, under the facts, that there was a want of ordinary diligence on the part of the company in the delivery of the package. We think the evidence justifies this conclusion. But we are not inclined to apply this rule to the delivery of goods intrusted to warehousemen and others in like condition. There must be a delivery to the right person. It is always in the power of the person having the goods in charge to identify the owner. If he suffer himself to be imposed on, it is his own fault.

The judgment is affirmed, with costs, and three per cent damages.

PRICE *v.* OSWEGO & SYRACUSE R. CO.

50 N. Y. 213. 1872.

Appeal from judgment of the General Term of the Supreme Court in the fourth judicial department, affirming a judgment in favor of defendant, entered upon the report of a referee. Reported below, 58 Barb. 599.

The action was brought against defendant as common carrier to recover the value of three bales of bags shipped by plaintiff at Syracuse, consigned to S. H. Wilson & Co., Oswego. The facts are stated sufficiently in the opinion.

Grover, J. The referee found as a conclusion of law, from the facts found, that the defendant, having delivered the bags to the person who made the order for them (although in the name of a fictitious firm) without notice of the fraud, was not liable to the plaintiff therefor. To this conclusion the appellant excepted. The counsel for the respondent insists that if the legal conclusion is not sustained by the facts found, the court will assume that he found

such additional facts as were necessary for that purpose. This position is correct, subject, however, to the qualification that it must appear from the case that such additional findings would have been warranted by the evidence. Oberlander *v.* Spiess, 45 N. Y. 175. In the present case there was no evidence warranting the finding of any additional facts sustaining the legal conclusion. The question, therefore, is whether such conclusion is sustained by the facts found. The facts (so far as material) found were: That the plaintiff, on and prior to September, 1866, was a dry-goods merchant, doing business in Syracuse. That the defendant was a common carrier of goods between Syracuse and Oswego. That a few days prior to the 10th of September, 1866, Caleb B. Morgan, a resident of Syracuse, received a letter by mail, dated and mailed at Oswego, directed to him at Syracuse, signed S. H. Wilson & Co., inquiring the price of bags. That Morgan had been a dealer in bags, but had given up the business, and upon receipt of the letter he delivered the same to the plaintiff, who kept bags for sale, and requested the plaintiff to inform him of the price of the said bags. That Morgan did not know any person or firm by the name of S. H. Wilson & Co., nor had he heard of any such person or firm, but delivered the letter to the plaintiff, believing it had been written in good faith in the ordinary course of business by a firm wishing to purchase bags. That the plaintiff upon receipt of the letter gave to Morgan the prices of bags, who communicated them in a letter, addressed and mailed by him to S. H. Wilson & Co., Oswego. That afterward, and on the 10th or 11th of September, the plaintiff received through the post-office at Syracuse a letter, mailed at Oswego, as follows: —

"Oswego, Sept. 10, 1866.

"Mr. Milton Price, — Sir: We are in want of some bags, and wrote Mr. Morgan, supposing he was in the trade, and he has quoted your prices for stock, etc. Please send us by rail 100 of each, and hope you can make the price a little less, and will be able to give you a larger order soon. Please send bill by mail, and we will remit check for amount of same.

"(Signed) S. H. Wilson & Co."

That on the 13th September, 1866, the plaintiff, with a view of complying with the order, delivered to the defendant at Syracuse three bales of bags, of the value of $205, directed to S. H. Wilson & Co., Oswego, and the defendant undertook as a common carrier to carry the bags to Oswego, and there deliver them to the consignees, and also mailed a bill of the bags to S. H. Wilson & Co., Oswego. That the defendant carried the bags to Oswego the same day, and soon after their arrival at Oswego and on the same day, a man called at the office of the defendant there, and asked defendant's agent if three bales of bags, directed to S. H. Wilson & Co., had arrived. He was informed that they had, and he then said they were what he wanted, and offered to and did pay the freight thereon, and they

were delivered to him by the agent of the defendant upon signing a receipt therefor in the name of S. H. Wilson & Co., and they were taken away. That the plaintiff did not know any person or firm by the name of S. H. Wilson & Co., and had no information of any such person or firm, except what was contained in their letter to him of September 10th and in the letter to Morgan. In fact, there was no such firm of S. H. Wilson & Co. in business at Oswego or elsewhere, and the letter written in the name of S. H. Wilson & Co. and the order were part of a scheme on the part of some person or persons to defraud the plaintiff of his property, and no part of the purchase price has been paid, nor has the property been recovered or the person who received the same from the defendant been traced. That the defendant, when said bags were received and delivered, did not know any person or firm by the name of S. H. Wilson & Co., nor did the defendant know the person to whom the bags were delivered, nor did they require any evidence of the identity of the person, or of his being connected with the firm of S. H. Wilson & Co. That it was the usual custom of the defendant not to deliver goods to a stranger without his being identified or his satisfying the defendant by papers or otherwise that he was entitled to receive them; and further, that reasonable care and prudence required such precautions to be taken. That the person to whom the bags were delivered by the defendant was the person who wrote the letters signed S. H. Wilson & Co., or his authorized agent to receive said bags in case they should be sent pursuant to the order of September 10th. That there was no evidence from which it could be found whether his name was S. H. Wilson or not. That when the plaintiff sent the bags he supposed that S. H. Wilson & Co. was the name of a firm at Oswego, and when the defendant delivered them at Oswego they had no knowledge of the fraud, and supposed that the person to whom they were delivered was a member of or represented the firm of S. H. Wilson & Co. It is the duty of a carrier to carry the goods to the place of delivery and deliver them to the consignee. When goods are safely conveyed to the place of destination and the consignee is dead, absent, or refuses to receive, or is not known and cannot after reasonable diligence be found, the carrier may be discharged from further responsibility as carrier by placing them in a proper warehouse for and on account of the owner. Fisk *v.* Newton, 1 Denio, 45. The responsibility continues as carrier until discharged in the manner above stated. Hence, a delivery to a wrong person, although upon a forged order, will not exonerate the carrier from responsibility. Powell *v.* Myers, 26 Wend. 591 [342]. In examining the cases, the distinction between the liability of carriers and warehousemen must be kept in mind. The former is responsible as insurer; the latter for proper diligence and care only, in the preservation of the property and its delivery to the true owner. The former must, at their peril, deliver property to the true owner, for

if delivery be made to the wrong person, either by an innocent mistake or through fraud of another, they will be responsible, and the wrongful delivery will constitute a conversion. McEntee *v.* The New Jersey Steamboat Co., 45 N. Y. 34 [**328**]. It is of the liability of a warehouseman after the responsibility as carrier had terminated that the chief judge is speaking in the opinion in Burnell *v.* The N. Y. Central R. R. Co., 45 N. Y. 184, where he holds that the defendant was responsible only for due care and diligence. In the present case the goods were consigned to S. H. Wilson & Co., Oswego. This plainly indicated some person, or, rather, persons, known by and doing business under that name. But as there was no such firm, and so far as the findings or case show, never had been, delivery could not be made to the consignees. Then, as already seen, it became the duty of the carrier to warehouse the goods for the owner. Instead of this, the defendant delivered them to a stranger without making any inquiry as to who or what he was, simply upon his inquiring if such goods for Wilson & Co. had arrived, and upon being informed that they had, saying that he wanted them. If the case had been determined by the referee upon the question whether due care had been used by the defendant, it would have been necessary to determine whether the goods were at the time held as carrier or as bailee of another character, as in the latter case only will the exercise of proper care exonerate from liability for the loss of the property. But as the legal conclusion of the referee shows that the judgment was not based upon any finding upon that question, but upon the legal conclusion of the referee, that the defendant was discharged from liability by having delivered the goods to the person who wrote the letters and orders, or his authorized agent, it is unnecessary to determine whether the defendant at the time held the goods as carrier or warehouseman, because if the legal conclusion is correct, a delivery to this person or his agent would have discharged the defendant in either case, entirely irrespective of the degree of care exercised in making delivery. The entire findings of the referee show that he would have held the defendant liable had the delivery under a like state of facts been made to any other than this person. The opinion of the learned judge, given at the General Term, shows that the judgment was affirmed by that court upon the same ground, and that the case would have been differently decided had the delivery been made to some other person. Indeed, this is the only reason that can with any plausibility be given for the judgment. As a finding, that proper care had been exercised by a bailee of goods whose duty it was to keep them for the owner, when he had delivered them to an entire stranger, who claimed to be the owner, and gave no evidence of his right except to make inquiry if they had arrived for the consignee, and saying that he wanted them, would be wholly unsupported by the evidence. The question is whether the person who

wrote the order acquired a right, so far as the defendant was concerned, to a delivery of the goods; in other words, whether as to it he was the consignee. If he was, the conclusion of the referee was correct. In that case, delivery to him discharged the carrier upon the principle that any delivery, valid as to the consignee, is a defence for the carrier as to all persons. It would hardly be claimed, in case there had been a firm doing business at Oswego under the name of S. H. Wilson & Co., a swindler would make himself consignee of goods or acquire any right whatever thereto, which were in fact consigned to such firm, simply by showing that he had forged an order in the name of the firm directing such consignment. If he would not thereby acquire any right to the goods, delivery to him would not protect the carrier any more than if made to any other person. In the American Express Co. *v.* Fletcher, 25 Indiana, 492, the facts were that a person claiming to be J. O'Riley presented himself to a telegraph operator, who was also agent of the express company, and presented a despatch to be forwarded to the plaintiff, signed J. O'Riley, requesting him to send $1,900, which the operator sent through. That in due time the operator, in his capacity of agent for the express company, received a package purporting to contain valuables, addressed to J. O'Riley, whereupon the same person who had sent the despatch presented himself and demanded the package, which was delivered to him. It turned out that this person was not J. O'Riley, but a swindler. *Held*, that the express company was liable to the plaintiff for the money. The case is silent as to whether J. O'Riley was a fictitious name, but I infer that it was not, as the plaintiff would not be likely to forward that amount of money to a person unknown to him. It will be seen that this was a much stronger case for the company than is that of the present defendant, so far as care was concerned, for the delivery was made to the person known by the company to be the one who sent the despatch, while the defendant knew nothing whatever about the letters or order, or how the goods came to be forwarded, consigned as they were. But the case directly decides that no right to the package was acquired by the swindler by sending a despatch therefor in the name of another. If no right is acquired by sending a despatch in the name of a real person, it is a little difficult to see how any is acquired by writing in the name of a firm having no existence, especially when the facts show, as in the present case, the consignor supposed he was dealing with a substantial business firm, and the consignment showed that it was intended to be made to such a firm.

In Ward *v.* The Vermont & Mass. R. R. [42 Vt. 700] one Collins represented to the plaintiff that there was a person of the name of J. F. Roberts residing at Roxbury, Mass., and fraudulently induced the plaintiff to consign goods to him. In fact, no such person resided there. Upon the arrival of the goods Collins went to a truckman and

personated Roberts, and as such sent the truckman for the goods, to whom they were delivered by the company. *Held*, that the company was liable to the plaintiff therefor. That, in principle, is like the present case. In this the swindler had in substance represented to the plaintiff that there was a business firm at Oswego wishing to purchase bags, and had fraudulently procured a consignment of bags from the plaintiff to this firm, when in fact there was no such firm. This gave the defendant no right to deliver the goods to any one else. The argument for the defendant is that the plaintiff consigned the goods to S. H. Wilson & Co., and there being no such firm, the person signing the name of the firm to the letter and order was in respect to the goods to be regarded as the firm for the purpose of delivery by the defendant. This is in direct conflict with the intention of the plaintiff, apparent from the consignment. That authorized a delivery to S. H. Wilson & Co., and to no other. There was not a particle of proof that the person who wrote the letter was ever known to any one by that name. The consignment did not, therefore, authorize a delivery to him. The defendant had no knowledge whatever of the letters, and his writing them furnished no evidence to it of his doing business in that name.

Duff *v.* Budd, 7 Eng. Com. Law, 399, was a case much like the present. The evidence that the person who received the goods was the same stranger who ordered them in a fictitious name, was equally strong as in the present case, yet there is no intimation that by this fraud he acquired any right to the goods or the defendant any authority to deliver them to him, and the plaintiff was held entitled to recover of the carrier therefor. See also Birkett *v.* Willan, 4 Eng. Com. Law, 540. Heugh *v.* The London Railway Co., 5 Law Exch. Reports, 51, and McKean *v.* Ivor, 6 id. 36, are relied upon by the defendant. In the former, one Nurse, who had been in the employ of a rubber company which had ceased to do business, wrote and sent to the plaintiff an order for goods in the name of the company. The plaintiff forwarded the goods by the defendant, a common carrier, consigned to the company. The defendant tendered the goods at the place where the company had carried on business. The persons in possession refusing to receive, they were taken away by the defendant, who, according to the course of business, wrote a letter addressed to the company, advising of the receipt of the goods and requesting their removal. Nurse thereafter came and presented this letter, with an order for the delivery of the goods, signed in the name of the company by him to the defendant, who thereupon delivered the goods to him. *Held*, that the liability of the defendant as carrier was terminated by the tender, and that whether the defendant had been negligent in the delivery was a question of fact for the jury. The latter was a case where goods had been sent to a fictitious firm upon a fraudulent order, by the plaintiff, consigned to the firm at 71 George Street, Glasgow,

that being the address specified in the order by the defendant, a carrier, who upon the arrival of the goods followed the usage universal among carriers at Glasgow, which was to send notice of the arrival of the goods, with a request for their removal. This notice was received by the one giving the order, who indorsed the name of the firm thereon and presented it to and obtained the goods from the defendant, *Held*, that the defendant having delivered the goods according to the universal usage of carriers, had complied with the directions of the consignor, which must be taken as including such usage, and was therefore not liable.

In Stephenson *v.* Hart, 4 Bing. 476, it was expressly held that the carrier had no right to make delivery to the writer of the fictitious order. But it is said that the plaintiff intended the goods should be delivered to the writer of the order. Not at all. He did not consign them to the writer of any order, but to Wilson & Co. This is the only evidence of his intention as to the persons to whom delivery should be made. It is further said that it was the plaintiff's negligence in forwarding the goods without ascertaining that there was in fact such a firm. I am unable to see what the defendant had to do with this. Its duty was to deliver to the firm, and if that could not be found, to warehouse and keep for the owner. The same might be said in every case where goods were forwarded to a consignee supposed to be at a particular place, but who in fact was not there. The usage of the defendant cannot avail him in this case. The referee has found just what was done. This accords with the evidence, in which there was no conflict.

The judgment appealed from must be reversed, and a new trial ordered, costs to abide event.

SAMUEL *v.* CHENEY.

135 Mass. 278. 1883.

Tort, against a common carrier, for the conversion of a quantity of cigars. At the trial in the Superior Court, before Colburn, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

Morton, C. J. The principal facts in this case, regarded in the light most favorable to the plaintiff, are as follows: —

In June, 1881, a swindler, assuming the name of A. Swannick, sent a letter to the plaintiff asking for a price list of cigars, and giving his address as "A. Swannick, P. O. box 1595, Saratoga Springs, N. Y." The plaintiff replied, addressing his letter according to this direction. The swindler then sent another letter ordering a quantity of cigars. The plaintiff forwarded the cigars by the

defendant, who is a common carrier, and at the same time sent a letter to the swindler addressed "A. Swannick, Esq., P. O. box 1595, Saratoga Springs, N. Y.," notifying him that he had so forwarded the goods.

There was at the time in Saratoga Springs a reputable dealer in groceries, liquors, and cigars, named Arthur Swannick, who had his shop at the corner of Ash Street and Franklin Street, and who issued his cards and held out his name on his signs and otherwise as "A. Swannick." He was in good credit, and was so reported in the books of E. Russell and Company, a well-known mercantile agency, of whom the plaintiff made inquiries before sending the goods. No other A. Swannick appeared in the Saratoga Directory for 1881, or was known to said mercantile agency. But in June, 1881, a man hired a shop at No. 16 Congress Street, Saratoga Springs, under the name of A. Swannick, and also hired a box, numbered 1595, in the post-office, and used printed letter-heads with his name printed as "A. Swannick, P. O. box 1595." This man wrote the letters to the plaintiff above spoken of, and received the answers sent by the plaintiff. He soon after disappeared.

The plaintiff supposed that the letters were written by, and that he was dealing with, Arthur Swannick. He sent the goods by the defendant, the packages being directed, "A. Swannick, Saratoga Springs, N. Y."

The defendant carried the packages safely to Saratoga Springs. On July 1, the defendant, by his agent, carried a package of cigars directed to A. Swannick to said Arthur Swannick, who refused to receive it on the ground that he had ordered no cigars. Afterwards, on the arrival of the packages, the value of which is sought to be recovered in this suit, the defendant carried the same to the shop No. 16 Congress Street, and delivered them to the person appearing to be the occupant of the shop, and took receipts signed by him as "A. Swannick."

We assume that his real name was not A. Swannick, but that he fraudulently assumed this name in Saratoga Springs and in his dealings with the plaintiff.

The question whether, under these circumstances, the property in the goods passed to the swindler, so that a *bona fide* purchaser could hold them against the plaintiff, is one not free from difficulty, and upon which there are conflicting decisions. The recent case of Cundy *v.* Lindsay, 3 App. Cas. 459, is similar to the case at bar in many of its features; and it was there held that there was no sale, that the property did not pass to the swindler, and therefore that the plaintiffs could recover its value of an innocent purchaser. That this case is very near the line is shown by the fact that such eminent judges as Blackburn and Mellor differed from the final decision of the House of Lords. Lindsay *v.* Cundy, 1 Q. B. D. 348.

But it is not necessary to decide this question, because the lia-

bility of the defendant as a common carrier does not necessarily turn upon it. The contract of the carrier is not that he will ascertain who is the owner of the goods and deliver them to him, but that he will deliver the goods according to the directions. If a man sells goods to A, and by mistake directs them to B, the carrier's duty is performed if he delivers them to B, although the unexpressed intention of the forwarder was that they should be delivered to A.

If, at the time of this transaction, the man who was in correspondence with the plaintiff had been the only man in Saratoga Springs known as, or who called himself, A. Swannick, it cannot be doubted that it would have been the defendant's duty to deliver the goods to him according to the direction, although he was an impostor, who by fraud induced the plaintiff to send the goods to him. Dunbar *v.* Boston & Providence Railroad, 110 Mass. 26. The fact that there were two bearing the name made it the duty of the defendant to ascertain which of the two was the one to whom the plaintiff sent the goods.

Suppose, upon the arrival of the goods in Saratoga Springs, the impostor had appeared and claimed them; to the demand of the defendant upon him to show that he was the man to whom they were sent, he replies, "True, there is another A. Swannick here, but he has nothing to do with this matter; I am the one who ordered and purchased the goods; here is the bill of the goods, and here is the letter notifying me of their consignment to me, addressed to me at my P. O. box, 1595." The defendant would be justified in delivering the goods to him whether he was the owner or not, because he had ascertained that he was the person to whom the plaintiff had sent them. It is true the defendant did not make these inquiries in detail; but if, by a rapid judgment, often necessary in carrying on a large business, he became correctly satisfied that the man to whom he made the delivery was the man to whom the plaintiff sent the goods, his rights and liabilities are the same as if he had pursued the inquiry more minutely.

The plaintiff contends that he intended to send the goods to Arthur Swannick. It is equally true that he intended to send them to the person with whom he was in correspondence. We think the more correct statement is, that he intended to send them to the man who ordered and agreed to pay for them, supposing, erroneously, that he was Arthur Swannick. It seems to us that the defendant, in answer to the plaintiff's claim, may well say, we have delivered the goods intrusted to us according to your directions, to the man to whom you sent them, and who, as we were induced to believe by your acts in dealing with him, was the man to whom you intended to send them; we are guilty of no fault or negligence.

The case at bar is in some respects similar to the case of M'Kean *v.* M'Ivor, L. R. 6 Ex. 36. There the plaintiffs, induced by a fictitious order sent to them by one Heddell, an agent of theirs to

procure orders, sent goods by the defendants, who were carriers, addressed to "C. Tait & Co., 71 George Street, Glasgow." There was no such firm as C. Tait & Co., but Heddell had made arrangements to receive the goods, at No. 71 George Street. Upon the arrival of the goods, the defendants, in the usual course of business, sent a notice to 71 George Street for the consignee to call for the goods, the notice saying that it ought to be indorsed so as to operate as a delivery order. Heddell indorsed the notice in the name of "C. Tait & Co.," and sent it to the defendants by a carter, to whom the goods were delivered. It was held that the defendants were not liable, upon the ground that no negligence was shown, and that, having delivered the goods according to the directions of the plaintiff, they had performed their duty; and the fact that they delivered to some person to whom the plaintiff did not intend delivery to be made, was not sufficient to make them liable for a conversion. See Heugh *v.* London & North Western Railroad, L. R. 5 Ex. 51; Clough *v.* London & North Western Railroad, L. R. 7 Ex. 26.

The cases of Winslow *v.* Vermont & Massachusetts Railroad, 42 Vt. 700, American Express Co. *v.* Fletcher, 25 Ind. 492, and Price *v.* Oswego & Syracuse Railway, 50 N. Y. 213 [**346**], differ widely in their facts from the case at bar, and are distinguishable from it.

Upon the facts of this case, we are of opinion that the defendant is not liable, in the absence of any proof of negligence; and therefore that the rulings at the trial were sufficiently favorable to the plaintiff.[1]

Exceptions overruled.

[1] The plaintiff requested the judge to rule that on the facts, which were undisputed and agreed, he was entitled to a verdict. The judge refused so to rule. The plaintiff then requested the judge to rule that, if the jury believed that in shipping these goods the plaintiff intended as the consignee A. Swannick, the person who was well rated in the commercial agency books, and that that intent was properly expressed in the address on the packages, and that the name of the person to whom delivery was in fact made was not A. Swannick, they must find a verdict for the plaintiff. The judge refused so to rule, and instructed the jury that, the intent of the plaintiff being uncommunicated to the defendant, except so far as expressed in the address on the packages, was of itself of no importance; and that if the delivery was made to a person who was known at Saratoga Springs by that name and no other, that was enough, so far as the question of name affected the legal result. The judge then left the single question to the jury, as to whether the defendant acted negligently in making the delivery he did, instructing them further that, although there was no question that there was a misdelivery of the goods in suit, the only question was, whether the defendant was guilty of negligence in making this misdelivery.

EDMUNDS *v.* MERCHANTS' DESPATCH TRANSP. CO.

135 Mass. 283. 1883.

THREE actions of tort, with counts in contract, against a common carrier, to recover the value of certain goods intrusted to the defendant by the plaintiffs, at Boston, for carriage to Dayton, Ohio. At the trial in the Superior Court, before ROCKWELL, J., the jury returned verdicts for the plaintiffs; and the defendant alleged exceptions. The facts appear in the opinion.

MORTON, C. J. These three cases were tried together. In some features they resemble the case of Samuel *v.* Cheney, *ante*, 278 [352]. In other material features they differ from it. They also, in some respects, differ from each other. In two of the cases a swindler, representing himself to be Edward Pape of Dayton, Ohio, who is a reputable and responsible merchant, appeared personally in Boston, and bought of the plaintiffs the goods which are the subject of the suits respectively. In those cases we think it clear, upon principle and authority, that there was a sale, and the property in the goods passed to the purchasers. The minds of the parties met and agreed upon all the terms of the sale, the thing sold, the price and time of payment, the person selling and the person buying. The fact that the seller was induced to sell by fraud of the buyer made the sale voidable, but not void. He could not have supposed that he was selling to any other person; his intention was to sell to the person present, and identified by sight and hearing; it does not defeat the sale because the buyer assumed a false name, or practised any other deceit to induce the vendor to sell.

In Cundy *v.* Lindsay, 3 App. Cas. 459, 464, where the question was whether a man, who in good faith had bought chattels of a swindler who had obtained possession of them by fraud, could hold them against the former owner, Lord Chancellor Cairns states the rule to be that, "if it turns out that the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract, — that is to say, a contract which has purported to pass the property to him from the owner of the property, — there the purchaser will obtain a good title."

In the cases before us, there was a *de facto* contract, purporting, and by which the plaintiffs intended, to pass the property and possession of the goods to the person buying them; and we are of opinion that the property did pass to the swindler who bought the goods. The sale was voidable by the plaintiffs; but the defendant, the carrier by whom they were forwarded, had no duty to inquire into its validity. The person who bought them, and who called himself Edward Pape, owned the goods, and upon their arrival in

Dayton had the right to demand them of the carrier. In delivering them to him, the carrier was guilty of no fault or negligence. It delivered them to the person who bought and owned them, who went by the name of Edward Pape, and thus answered the direction upon the packages, and who was the person to whom the plaintiffs sent them. Dunbar *v.* Boston & Providence Railroad, 110 Mass. 26. The learned judge who tried the cases in the Superior Court based his charge upon a different view of the law; and, as the three cases were tried together, there must be a new trial in each.

It seems to have been assumed that the same questions are raised in each case. It is proper that we should add that the third case differs materially from the others. In that case, the contract did not purport, nor the plaintiffs intend, to sell to the person who was present and ordered the goods. The swindler introduced himself as a brother of Edward Pape of Dayton, Ohio, buying for him. By referring to the mercantile agency, he tacitly represented that he was buying for the Edward Pape who was there recorded as a man of means. The plaintiffs understood that they were selling, and intended to sell, to the real Edward Pape. There was no contract made with him, because the swindler who acted as his agent had no authority, but there was no contract of sale made with any one else. The relation of vendor and vendee never existed between the plaintiffs and the swindler. The property in the goods, therefore, did not pass to the swindler; and the defendant cannot defend, as in other cases, upon the ground that it has delivered the goods to the real owner. Hardman *v.* Booth, 32 L. J., N. S., Ex. 105; Kingsford *v.* Merry, 26 L. J., N. S., Ex. 83; Barker *v.* Dinsmore, 72 Penn. St. 427.

Whether the defendant has any other justification or excuse for delivering the goods to the swindler is a question not raised by this bill of exceptions, and not considered at the trial; and therefore we cannot express an opinion upon it.

Exceptions sustained.

WERNWAG *v.* PHIL., W. & B. R. CO.

117 Penn. St. 46. 1887.

[Agreed statement of facts.] The defendants are common carriers of goods between Philadelphia, Pa., and Washington, D. C. William P. Wernwag and T. Russell Dawson, trading as Wernwag & Dawson, are dry-goods commission merchants, doing business in the city of Philadelphia. The firm of E. F. Witmer & Co., of Baltimore, were the plaintiffs' agents for the sale of their goods in the city of Washington, D. C. The said firm of E. F. Witmer &

Co. employed one Wilbur F. Murphy to take orders for plaintiffs' goods in Washington, D. C. The said Murphy visited one Leopold Behrend, doing a dry-goods business in said city, and took an order for certain goods of plaintiffs. This order was entered by the said Murphy on one of the blanks of E. F. Witmer & Co., and was transmitted to the plaintiffs. When it was received by them it read as follows: —

BALTIMORE, Nov. 3d. 1883.

Messrs. WERNWAG & DAWSON,
Philadelphia:

Ship to L. Behrend.
Washington, D. C.,
By Fast Freight.
Terms 5 | 30—30 days extra dating.

4	I	5
&c.,	&c.,	&c.

(Signed) E. F. WITMER & Co.

When plaintiffs received this order, for the purpose of ascertaining the financial responsibility of L. Behrend, they examined the volume of commercial reports in their possession, which purported to give a full list of merchants doing business in Washington, D. C., but the name of L. Behrend was not on the list. They had, however, previously sold goods to one A. Behrend, doing a dry-goods business in said city of Washington, who had been satisfactory to them as a customer in every respect; and in consequence of not finding the name of L. Behrend in the commercial report, they supposed that the salesman had made a mistake in entering the name of the purchaser on the order, and had written L. Behrend instead of A. Behrend, intending to write the latter.

Being of this opinion, the plaintiffs determined to ship the goods ordered to A. Behrend, and on November 5, 1883, shipped to him by the defendant railroad five pieces of black cashmere and one piece of worsted, of the total value of $242.37. The goods were charged to A. Behrend, in the books of the plaintiffs; the box was marked "A. Behrend, Washington, D. C.;" the bill of lading or receipt given for the goods by the defendant describes the goods as marked A. Behrend, and a bill was made out by plaintiffs in the name of A. Behrend, and was sent by post addressed to A. Behrend.

The firm of E. F. Witmer & Co. were agents of the plaintiffs only for the purpose of soliciting orders for goods. The plaintiffs reserved to themselves the right to determine, on the receipt of an order from E. F. Witmer & Co., whether or not they would ship the goods ordered, to the party ordering the same; and the said E. F. Witmer & Co. had nothing whatever to do with the delivery of the goods shipped on orders forwarded by them. That was controlled entirely by plaintiffs.

When the package of goods aforesaid arrived in Washington over

the line of the defendant's road, it was claimed by the said Leopold Behrend. The said A. Behrend, to whom the plaintiffs supposed they were selling the goods, and whose name was on the box, was not then in business in Washington, though he was living there at the time.

Before delivering the goods to the said Leopold Behrend, the agent of the railroad company defendant inquired of the said Wilbur F. Murphy, the agent who had taken the order, whether he had sold any goods to Leopold Behrend, and what class of goods they were; and after Murphy had said that he had sold goods to Leopold Behrend, and had described them, the agent of the defendant delivered them to Leopold Behrend. The goods so delivered were the same goods which plaintiffs had shipped to A. Behrend as aforesaid.

After the plaintiffs had delivered the said goods to defendant for transportation on November 5, 1883, they heard nothing concerning them until they received a notice, dated January 14, 1884, that Leopold Behrend had assigned his property for the benefit of his creditors, and requesting them to forward a statement of their claim to his assignee.

The assigned estate of the said Leopold Behrend never paid any dividend to the general creditors, and the goods so shipped by them and delivered by the defendant to the said Leopold Behrend were totally lost to plaintiffs.

If the court be of the opinion that on the above facts their judgment should be for the plaintiffs, then judgment is to be entered for plaintiffs for $242.37, with interest from November 5, 1883; but, if not, then judgment to be entered for the defendant, the costs to follow the judgment, and either party reserving the right to sue out a writ of error.

The judgment of the court was for the defendant, no opinion being filed. Thereupon the plaintiffs took this writ, assigning for error the entry of said judgment.

Mr. Justice Green. From the facts appearing in the case stated it is manifest that the plaintiff intended to sell, and in point of fact did consign, the goods in question to A. Behrend and not to L. Behrend. They knew the former and were satisfied to sell to him. They did not know the latter and did not intend to sell to him. They supposed that A. Behrend was intended as the purchaser in the order, though L. Behrend was named. Granting this to be a mistake of theirs in the reading of the order, it does not in the least alter the fact that A. Behrend was the person to whom they supposed they were selling. However that may be, they certainly consigned the goods to A. Behrend, and there was then such a person living in Washington, the place to which the goods were shipped.

It cannot be questioned for a moment that it was the duty of the carrier to deliver the goods to the person to whom the owner consigned them. If the carrier does not so deliver them, he acts at his

peril, and the whole risk of a wrong delivery rests upon him. In Shenk v. Steam Propeller Co., 60 Pa. 109, we said, Sharswood, J.: "Whatever doubt may hang over the question as to the termination of a carrier's or other bailee's responsibility, there is one point which is indisputable, that he must take care at his peril that the goods are delivered to the right person, for a delivery to a wrong person renders him clearly responsible though innocently and by mistake."

In the present case the goods were delivered to L. Behrend, and, as between the plaintiffs and the carrier, that was undoubtedly a wrong delivery. But it is argued that the delivery to L. Behrend was made in consequence of the direction of Murphy, who it is said was the plaintiffs' agent. If, in the case stated, it appeared that Murphy did direct the delivery to L. Behrend, this contention would have great force; because it was Murphy who sold the goods and sent the order; and it would be difficult for the plaintiffs to escape the consequences of his act in directing the delivery. But the only averment upon this subject which the case stated contains, is in the following words: "Before delivering the goods to the said Leopold Behrend, the agent of the railroad company defendant inquired of the said Wilbur F. Murphy, the agent who had taken the order, whether he had sold any goods to Leopold Behrend and what class of goods they were; and after Murphy had said that he had sold goods to Leopold Behrend, and had described them, the agent of the defendant delivered them to Leopold Behrend. The goods so delivered were the same goods which plaintiffs had shipped to A. Behrend as aforesaid." From this it appears that Murphy gave no directions to deliver the goods to any one. He merely said he had sold goods to L. Behrend and described them. Granting that they were the same kind of goods, and even the same goods, which Murphy had sold to L. Behrend (and this important fact is not mentioned in the case stated), yet that was as far as Murphy went, or as he was asked to go, in giving information. The effect of that information, as sufficing to exonerate the defendant from liability for a wrong delivery, was a matter of which the defendant through its agent took the entire risk. In this at least the plaintiffs were in no fault. Their agent, if Murphy was their agent, simply told the defendant's agent that he had sold goods to L. Behrend and described them, and thereupon the defendant's agent delivered these particular goods to L. Behrend. By what authority did he do this? The goods were consigned to another person, and the defendant's duty was to deliver to that person. Surely that duty was not discharged by a delivery to one who was not the consignee, merely because the plaintiffs' agent had sold similar goods to such a person. The fact still remained that the goods were not delivered to the one to whom they were consigned. The entire risk of a delivery to the right person was assumed by the defendant, and a wrong delivery was made by

the mistake of the defendant's agent, which, of course, is their misfortune. We are clearly of opinion that the plaintiffs were entitled to judgment on the case stated.

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f. *Stoppage in Transitu.*

HUTCHINSON ON CARRIERS.

§ 409. **Carriers may show Stoppage to excuse Delivery.** — Another excuse which the carrier may set up for the non-delivery of the goods is that the vendor has exercised his right of stoppage *in transitu*. This right arises upon the discovery by the vendor, after the sale of the goods on a credit, of the insolvency of the buyer, and is said to be based on the plain reason of justice and equity, that one man's goods shall not be applied to the payment of another man's debts. If, therefore, after the vendor has delivered the goods out of his own possession, and has put them into the hands of the carrier for delivery to the buyer, he discovers that the buyer is insolvent, he may retake the goods, if he can, before they reach the buyer's possession, and thus avoid having his property applied to paying debts due by the buyer to other people. This right of the vendor of the goods is held to continue from the time he parts with their possession until they have come into the actual possession of the buyer, and may be enforced by him no matter into whose possession they may have come in the course of the transportation, at any time before their delivery to the buyer or to his agent, or to a purchaser of them from the buyer by a *bona fide* indorsement and transfer of the bill of lading. The right is highly favored by the law on account of its intrinsic justice, and prevails almost universally among civilized nations; but it arises only in favor of one who stands in the relation of vendor to the goods.

§ 410. **How Right exercised.** — No particular form or mode has been held necessary in the exercise of this right, and it has even been said that the vendor was so much favored in exercising it as to be justifiable in getting his goods back, by any means not criminal, before they reached the possession of an insolvent vendee. All that is required is some act or declaration of the vendor, or his agent, countermanding the delivery, and the usual mode is by a simple notice to the carrier, stating the vendor's claim, forbidding delivery to the vendee, or requiring that the goods shall be held subject to the vendor's orders. The vendor may, however, and sometimes does, resort to a possessory legal action, such as replevin or attachment, in the first instance, and takes the goods by legal process, either from the carrier himself or from some officer who has seized them for a debt of the vendee. Or resort may be had to

a bill in equity, the jurisdiction of which to enforce the vendor's right of stoppage is said to be unquestionable.

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§ 421. **Duty and Liability of Carrier after Notice.** — The insolvency of the buyer is essential to the existence of the right of the vendor to stop the goods. If, therefore, the former be solvent at the time of its attempted exercise, the carrier, if he know the fact, will be not only justified in refusing to give up the goods or to pay attention to the notice, but it would be his duty to do so. He obeys the order or demand at his peril in any case. For, while a rightful stoppage protects the carrier against the claims of the consignee, yet if it should turn out that the purchaser of the goods was solvent, the notice or demand would be entirely without authority. If, therefore, the carrier refuse to give up the goods to the consignee, who is solvent, upon his demand, the latter might maintain an action of trover against him at once. If, on the other hand, the carrier fail to withhold the goods upon a notice to do so, or to surrender their possession to the vendor upon his demand, or if, after such notice or demand, he should deliver them to the buyer, and it should turn out that the latter was insolvent, the carrier will be liable to the vendor, at least to the extent of the buyer's indebtedness for the goods. It has therefore been said that, "as the carrier obeys the stoppage *in transitu* at his peril, if the consignee be in fact solvent, it would seem no unreasonable rule to require that, at the time the consignee was refused the goods, he should have evidenced his insolvency by some overt act." But in the case of The Tigress [32 L. T. Adm. 97] this suggestion is rejected, the judge saying that the proof of the conditions on which the vendor's rights depend would always be difficult, often impossible, at the time of their exercise: "for instance, whether the vendee is insolvent may not transpire till afterwards, when the bill of exchange for the goods becomes due; for it is, as I conceive, clear law that the right to stop does not require the vendee to have been found insolvent."

§ 422. **Course to be pursued by Carrier, for his own Protection.** — The law of stoppage *in transitu*, therefore, becomes of great importance to the common carrier; and when a notice is given or a demand is made upon him for the goods by a vendor who claims the right to avail himself of it in the particular case, it places him in very nearly the same situation as when a demand is made for the goods by one who claims adversely to the bailor or his consignee. If it be doubtful whether the right exists to stop the goods, the carrier may, as in that case, instead of refusing to comply with the notice or the demand, require that he shall be allowed a reasonable time to investigate the condition of the buyer; and if, after inquiry, he shall be unable to satisfy himself, and does not choose to assume the responsibility of a delivery to either seller or buyer, or to act upon the demand of the vendor that the goods shall be withheld

from the consignee, he may, for his own security, resort to legal proceedings to have the question determined, as in the case of adverse claimants of the property.

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g. *Seizure under Legal Process.*

STILES *v.* DAVIS.

1 Black (U. S.) 101. 1861.

Mr. Justice Nelson. The case was this: The plaintiffs below, Davis and Barton, had purchased the remnants of a store of dry-goods of the assignee of a firm at Janesville, Wisconsin, who had failed, and made an assignment for the benefit of their creditors. The goods were packed in boxes, and delivered to the agents of the Union Despatch Company to be conveyed by railroad to Ilion, Herkimer County, New York.

On the arrival of the goods in Chicago, on their way to the place of destination, they were seized by the sheriff, under an attachment issued in behalf of the creditors of the insolvent firm at Janesville, as the property of that firm, and the defendant, one of the proprietors and agent of the Union Despatch Company at Chicago, was summoned as garnishee. The goods were held by the sheriff, under the attachment, until judgment and execution, when they were sold. They were attached, and the defendant summoned on the third of November, 1857; and some days afterwards, and before the commencement of this suit, which was on the sixteenth of the month, the plaintiffs made a demand on the defendant for their goods, which was refused, on the ground he had been summoned as garnishee in the attachment suit.

The court below charged the jury that any proceedings in the State court to which the plaintiffs were not parties, and of which they had no notice, did not bind them or their property; and further, that the fact of the goods being garnished, as the property of third persons, of itself, under the circumstances of the case, constituted no bar to the action; but said the jury might weigh that fact in determining whether or not there was a conversion.

We think the court below erred. After the seizure of the goods by the sheriff, under the attachment, they were in the custody of the law, and the defendant could not comply with the demand of the plaintiffs without a breach of it, even admitting the goods to have been, at the time, in his actual possession. The case, however, shows that they were in the possession of the sheriff's officer or agent, and continued there until disposed of under the judgment

upon the attachment. It is true, that these goods had been delivered to the defendant, as carriers, by the plaintiffs, to be conveyed for them to the place of destination, and were seized under an attachment against third persons; but this circumstance did not impair the legal effect of the seizure or custody of the goods under it, so as to justify the defendant in taking them out of the hands of the sheriff. The right of the sheriff to hold them was a question of law, to be determined by the proper legal proceedings, and not at the will of the defendant, nor that of the plaintiffs. The law on this subject is well settled, as may be seen on a reference to the cases collected in sections 453, 290, 350, of Drake on Attach't, 2d edition.

This precise question was determined in Verrall *v.* Robinson, Turwhitt's Exch. R. 1069; 4 Dowling, 242, S. C. There the plaintiff was a coach proprietor, and the defendant the owner of a carriage depository in the city of London. One Banks hired a chaise from the plaintiff, and afterwards left it at the defendant's depository. While it remained there, it was attached in an action against Banks; and, on that ground, the defendant refused to deliver it up to the plaintiff on demand, although he admitted it to be his property.

Lord ABINGER, C. B., observed that the defendant's refusal to deliver the chaise to the plaintiff was grounded on its being on his premises, in the custody of the law. That this was no evidence of a wrongful conversion to his own use. After it was attached as Banks' property, it was not in the custody of the defendant, in such manner as to permit him to deliver it up at all. And ALDERSON, B., observed: Had the defendant delivered it, as requested, he would have been guilty of a breach of law.

The plaintiffs have mistaken their remedy. They should have brought their action against the officer who seized the goods, or against the plaintiffs in the attachment suit, if the seizure was made under their direction. As to these parties, the process being against third persons, it would have furnished no justification if the plaintiff could have maintained a title and right to possession in themselves.

Judgment of the court below reversed.

BLIVEN *v.* HUDSON RIVER R. CO.

36 N. Y. 403. 1867.

PARKER, J. On the second day of September, 1859, the plaintiffs delivered to the defendants, at their depot, in the village of Sing Sing, Westchester County, twenty-nine cases of saw plates and

handles, of the value of $4,338.82, for transportation to the city of New York, which were on that day placed by the defendant in their freight cars for that purpose.

Before the regular hour for the departure of the train in which they were to go, a complaint was made on oath by one Cheeseman, to a justice of the peace at Sing Sing, to the effect that the said merchandise had been stolen or embezzled from the Eagle Saw Manufacturing Company at Sing Sing (of which company Cheeseman claimed to be the secretary), and that he suspected that the said property was concealed in a railroad car at the Sing Sing depot. The magistrate thereupon issued a warrant to search for the property, and delivered it to a constable of the town, who, in proceeding under it, on the morning of the 3d of September, forcibly opened the car in which the merchandise was locked, and seized, and took the same before the justice, who thereupon sent the same to the place of business of the said manufacturing company, and there delivered the same to said Cheeseman, for said company. The plaintiff, Bliven, was at such place of business on the morning of the day on which the merchandise was so delivered, and was then made acquainted with, and fully knew, all the circumstances attending the taking of said merchandise out of the possession of the defendants, as before stated.

It further appears, by the findings of the referee before whom the cause was tried, that the certificate, by the filing of which on the 28th of November, 1858, the company became incorporated, provided for the management of its affairs by five trustees, of whom plaintiff Bliven was one, and Cheeseman one; and that by the by-laws, three trustees constituted a quorum; that on the organization of the company, a president, treasurer, and secretary were chosen from the five trustees, Bliven being the treasurer. The manufacturing carried on by the company was done in the Sing Sing prison, by the hired labor of convicts, in shops provided for the company and under a superintendent employed by the company. Immediately upon the organization, a contract was made by the company with the plaintiffs, by which plaintiffs were to have the sale of all articles made by the company, on a commission, and were to make advances to the company, and hold all the articles consigned to them as security for such advances. And subsequently, on the 30th of June, 1859, the company gave the plaintiffs a chattel mortgage on all their fixtures and stock, manufactured and unmanufactured, and all their other goods and chattels then or thereafter to be at the works in Sing Sing prison, as security for the payment to plaintiffs on demand, of all advances made, or to be made, by them to the company.

On the 31st of August, 1859, at an adjourned meeting of the trustees, the said Cheeseman and one other trustee, in the absence of the others, assumed to remove the president, and declare his office as trustee, vacant, and to elect one Francis trustee in his place; and

at a subsequent time in New York, to which they adjourned, assumed in conjunction with said Francis, to remove the secretary from his office, as such, and to appoint Cheeseman in his place.

Cheeseman thereupon proceeded to Sing Sing, to the works of the company in the prison, and took possession as secretary, notifying Hawley, the secretary, of his removal.

On the 2d of September, in the absence of Cheeseman and the superintendent, Hawley, still claiming to be secretary, went with Bliven to the premises, and caused the articles of merchandise in question, which were not in a state of completeness for the market, to be boxed up and delivered to Bliven for the plaintiffs, and he thereupon delivered them, as before stated, to the defendants, for transportation to New York, where was the plaintiffs' place of business for selling the merchandise received by them for sale. It does not appear from the findings of the referee that the plaintiffs had made any advances to the company, or that the company was at that time indebted to the plaintiffs.

There is no dispute that the ownership of the goods was in the manufacturing company, and the facts found fall short of showing that the plaintiffs had any lien upon them. The taking of them by Bliven, on the 2d of September, was not warranted by the original contract, for that contemplated only the consignment to the plaintiffs of articles fitted for the market. Neither was it warranted by the subsequent mortgage, for there was no indebtedness, so far as appears, on which to rest a lien, by virtue of it. The description of the mortgage given by the referee, is that it was upon "all the engines, shafts, tools, anvils, and fixtures, stock manufactured and unmanufactured, or in course of manufacture, and all other goods and chattels of the company now or hereafter to be at the works in Sing Sing prison, as security for the payment to the plaintiffs, on demand, of all advances made, *or to be made*, by them to the company." The fact of the existence of such a mortgage does not carry with it the presumption of an existing indebtedness, as between the plaintiffs and the company; therefore, so far as appears, not only the ownership, but the right of possession belonged to the company.

The goods, then, belonging, in fact, to the company, without any right of possession in the plaintiffs, the delivery of them by the justice at the company's shop, from which they had been taken, to a person having the actual possession of it for the company, was a delivery to the company.

The defendants, then, are entitled to take the ground that the goods were taken from them by valid legal process, and under such process delivered to the true owner.

If it is said that the evidence shows an indebtedness from the company to the plaintiffs, we are not at liberty to go into the evidence for the facts, but must take them from the findings of the referee. If we were at liberty to examine the evidence, and form

our own conclusions of fact, we should see Bliven present at, or immediately after, the delivering up of the goods at the company's rooms, claiming them under plaintiffs' mortgage, and as agent of the company, and directing Rooney, the superintendent, who was in charge of the establishment for the company, to keep them, and let no one take them without his (Bliven's) consent, and that Rooney thereupon put them back where they belonged, and where they had been the day before, and that they remained there about a month. This, I think, we should have to consider, either as a taking of them into his own possession, or as consenting to the possession of the company, either of which would exonerate the defendants.

But as the case stands upon the findings of the referee, I think it may well be considered a case of delivery to the true owners, through the regular process of the law; so that, even if the mere taking of them out of the defendants' possession by valid legal process would not alone be a defence, there can be no doubt that, on this ground, a good defence was made to the action. It is well settled that the right of the true owner may be set up by the carrier as a defence against the shipper or bailor, in all cases where the property has been delivered up to him by the carrier, whether voluntarily on demand, as in Bates *v.* Stanton, 1 Duer, 79, or taken by process in a suit instituted for that purpose. Van Winkle *v.* U. S. Steamship Co., 37 Barb. 122; Barton *v.* Wilkinson, 18 Vern. 186.

But my associates, not passing upon the question whether the property was delivered to the true owners, desire to put this case upon the doctrine that the common carrier is exonerated from his obligation to his bailor, where the property of the latter is taken from him by due legal process, provided the bailor is promptly notified of such taking.

It is to be remembered that the plaintiff Bliven had notice of the taking of the merchandise from the defendants, with all the circumstances attending it, on the morning when it occurred; so that the case is fully within the doctrine just referred to.

The judgment of the Supreme Court should therefore be affirmed.

All affirm, on the ground that when the property is taken from the carrier by legal process, and he gives notice thereof, he is discharged.

OHIO & MISSISSIPPI R. CO. *v.* YOHE.

51 Ind. 181. 1875.

Downey, J. This was an action by appellees against the appellant as a common carrier.

It is alleged in the complaint that the plaintiffs' consignors, on

the 3d of November, 1873, delivered to the appellant, at Bridgeport, Illinois, a quantity of wheat, to be carried to Vincennes, Indiana, and delivered to the appellees. The appellant signed and delivered a bill of lading evidencing the contract, and this is the foundation of the action.

It is alleged that the company failed to deliver the wheat according to the contract, etc. A demurrer to the complaint was filed and overruled.

The defendant moved the court, on affidavit, to stay the action until the determination of an action of replevin in Illinois, involving the title and ownership of the property, brought by one Johnson. This motion having been overruled, the defendant asked that Johnson be made a party to the action, which request was also refused. Thereupon the defendant pleaded, in substance, that while the wheat was in a car of the company, at Bridgeport, awaiting the coming of a train and engine to transport it to Vincennes, in accordance with the bill of lading, without any act, fault, or connivance of the defendant, or of any of her agents, servants, or employees, Johnson sued out of the office of the clerk of the Circuit Court of Lawrence County, Illinois, a writ of replevin, the said Johnson then and there claiming to be the owner and entitled to the possession of said wheat, and, by virtue of said writ, the sheriff of said county seized and took the same out of the possession of the defendant, and delivered the same to said Johnson, according to law and the command of said writ, and the said Johnson took possession thereof; that said action is yet pending, by reason whereof the defendant was prevented from transporting said wheat to said city of Vincennes, and delivering the same to the plaintiffs. It is averred that said Lawrence Circuit Court had jurisdiction, and certified copies of the papers and process in the action of replevin, etc., are filed with the answer.

A demurrer to this answer, on the ground that it did not state facts sufficient to constitute a defence to the action, was filed by the plaintiffs and sustained by the court. The defendant declining to answer further, there was judgment for the plaintiffs.

It is objected to the complaint that it does not show that the plaintiffs own the wheat, or that they are the consignees mentioned in the bill of lading. There is no foundation for these objections. The complaint alleges that the plaintiffs purchased the wheat of the consignors; that the consignors delivered the same to the defendant; and that the defendant executed the bill of lading to the plaintiffs.

It is further assigned as error, that the court improperly sustained the demurrer to the answer.

The question presented is this. Is a common carrier of goods excused from liability for not carrying and delivering the goods, when they are, without any act, fault, or connivance on his part, seized, by virtue of legal process, and taken out of his possession?

It is impossible for the carrier to deliver the goods to the consignee when they have been seized by legal process and taken out of his possession. The carrier cannot stop, when goods are offered to him for carriage, to investigate the question as to their ownership. Nor do we think he is bound, when the goods are so taken out of his possession, to follow them up, and be at the trouble and expense of asserting the claim thereto of the party to or for whom he undertook to carry them. We do not think it material what the form of the process may be. In every case the carrier must yield to the authority of legal process.

After the seizure of the goods by the officer, by virtue of the process, they are in the custody of the law, and the carrier cannot comply with his contract without a resistance of the process and a violation of law.

The right of the sheriff to hold the goods involved questions which could only be determined by the tribunal which issued the process or some other competent tribunal, and the carrier had no power to decide them. If the goods were wrongfully seized, the plaintiffs have their remedy against the officer who seized them, or against the party at whose instance it was done. As between these parties, the process would be no justification if the plaintiffs were the owners and entitled to the possession of the goods.

It makes no difference, we think, that the process was issued by a tribunal of a State different from that in which the plaintiffs reside. The rule must be the same as in a case where the process emanates from a court in the State of the plaintiff's residence.

It cannot be denied that the carrier must obey the laws of the several States in which it follows its calling. The laws of Illinois which give force and effect to a writ of replevin must be obeyed. It cannot say to the sheriff, who is armed with a writ issued in due form of law, commanding him to take the property, that it has executed a bill of lading, and thereby agreed to transport the property to another State, and therefore he cannot have it. The sheriff would have the right, and it would become his duty, to call out the power of the county to aid in serving his lawful process.

The carrier is deprived of the possession of the property by a superior power, the power of the State,—the *vis major* of the civil law,—and in all things as potent and overpowering, as far as the carrier is concerned, as if it were the "act of God or the public enemy." In fact, it amounts to the same thing; the carrier is equally powerless in the grasp of either.

In Redf. Railw., vol. 2, p. 158, the learned author says that it is settled that the bailee may defend against the claim of the bailor, by showing that the goods have been taken from him by legal process. And in a note he adds, "If this defence were not valid, it might compel the party to resist the acts of a public officer in the discharge of his duty, which the law will never do."

In New York, where property was forcibly seized by a constable, on a complaint that the property had been stolen, the court said, "But my associates, not passing upon the question whether the property was delivered to the true owners, desire to put this case upon the doctrine that the common carrier is exonerated from his obligation to his bailor, where the property of the latter is taken from him by due legal process, provided the bailor is promptly notified of such taking. . . . The judgment of the Supreme Court should therefore be affirmed. All affirm, on the ground that when the property is taken from the carrier by legal process, and he gives notice thereof, he is discharged." Bliven *v.* Hudson River R. R. Co., 36 N. Y. 403 [**364**].

In this same case, in the Supreme Court, it was held that "the bailee must assure himself, and show the court that the proceedings are regular and valid, but he is not bound to litigate for his bailor, or to show that the judgment or decision of the tribunal issuing the process, or seizing the goods, was correct in law or in fact. This is the rule as to bailees in general, and it includes the case of common carriers." Bliven *v.* Hudson River R. R. Co., 35 Barb. 191.

In a case where goods were seized on attachment, the court held, "If goods are taken from a bailee or carrier by authority of law, in any case coming within these exceptions, there is no doubt that it is a good defence to an action by the bailor or shipper, for a non-delivery." Van Winkle *v.* United States Mail Steamship Co., 37 Barb. 122.

In Vermont, where goods in the hands of a wharfinger were seized under legal process, the court held that if they are taken from the wharfinger or warehouseman by lawful process, the wharfinger or warehouseman can protect himself in a suit brought against him by the owner. Burton *v.* Wilkinson, 18 Vt. 186.

In the Supreme Court of the United States, where goods in the hands of a carrier had been attached by a third party, in a suit brought by the consignees on a bill of lading, Mr. Justice Nelson, in delivering the opinion of the court, said: —

"After the seizure of the goods by the sheriff, under the attachment, they were in the custody of the law, and the defendant could not comply with the demand of the plaintiffs without a breach of it, even admitting the goods to have been, at the time, in his actual possession. The case, however, shows that they were in the possession of the sheriff's officer or agent, and continued there until disposed of under the judgment upon the attachment. It is true that these goods had been delivered to the defendant, as carriers, by the plaintiffs, to be conveyed for them to the place of destination, and were seized under an attachment against third persons; but this circumstance did not impair the legal effect of the seizure or custody of the goods under it, so as to justify the defendant in taking them out of the hands of the sheriff. The right of the sheriff to hold

them was a question of law, to be determined by the proper legal proceedings, and not at the will of the defendant nor that of the plaintiffs. The law on this subject is well settled, as may be seen on a reference to the cases collected in sections 453, 290, 350, of Drake on Attachment, second edition." Stiles *v.* Davis, 1 Black, 101 [**363**].

The above case is the same as the case at bar, with the single exception that in Stiles *v.* Davis the goods were seized under an attachment, while in this case they were seized under a writ of replevin.

There is a defect, however, in the answer, which justified the Circuit Court in holding it bad, and that is the want of an averment that the defendant gave immediate notice to the plaintiffs that the goods had been seized and taken out of its possession. That the carrier should do this seems to be a necessary and reasonable qualification of the rule. The rule is laid down with this qualification in Bliven *v.* The Hudson River R. R. Co., *supra*. The only averment as to notice in the answer is this: "And the defendant further avers that said plaintiffs had notice before the commencement of this suit, that said action of replevin was pending," etc. The bill of lading bears date November 3d, 1873. The writ of replevin bears date November 5th, 1873. The wheat was taken and delivered to Johnson on the 6th day of November, 1873. The record does not show when this action was commenced. The first date given is that of the filing of the amended complaint, February 7th, 1874. There is nothing from which we can find that proper diligence was used by the carrier in giving notice of the seizure of the goods.

It may be repeated that the wheat was received by the defendant on the 3d day of November, 1873, and was not seized until the 6th. It is probable that a satisfactory excuse or reason should be alleged why the wheat was not moved before the seizure. The answer admits the receipt of the wheat and the execution of the bill of lading, on the 3d of November, and then alleges, "and thereupon said wheat was loaded into a car of defendant then standing upon her side track, at said town of Bridgeport, and while said wheat was in said car, and so upon said track, and awaiting the arrival of a train and engine to transport the same to the city of Vincennes aforesaid, in accordance with the terms of said bill of lading, and without the act, fault, or connivance of the defendants or of any of her agents, servants, or employees, one Benjamin F. Johnson sued out," etc. It is very questionable whether this shows proper diligence on the part of the carrier. We need not, however, decide this question. Clearly, we think, the carrier cannot make use of the fact that the property has been seized by legal process to shield himself from liability for his own negligence, or to justify any improper confederation with the party or officer seizing the goods.

The rulings of the court on the motions to stay the proceedings in

the action, and to cause Johnson to be made a party to the action, were proper, for the reasons stated in determining the validity of the answer.

A question is made concerning the publication of a deposition taken by the plaintiffs, which, it is contended, was not properly directed on the envelope. But as the deposition was not used on the trial, the defendant could not have been injured by this ruling.

The judgment below is affirmed, with costs.

EDWARDS *v.* WHITE LINE TRANSIT CO.

104 Mass. 159. 1870.

CONTRACT against common carriers for breach of their agreement to carry safely from Cincinnati to Providence, and deliver to the plaintiffs a car-load of middlings. Another count on a contract to carry corn is now immaterial.

WELLS, J. The only exception relied on here is that which relates to the car-load of "middlings" taken from the carriers by attachment, and sold on execution, in a suit brought in New York against the plaintiffs' consignors, David Schwartz & Company, by parties from whom they had previously obtained the property.

The court held, and we think correctly, that there was a sufficient transfer and delivery from David Schwartz & Company to vest the title in the plaintiffs; that the suit against David Schwartz & Company, the judgment therein, and levy upon the property, were sufficient to show a waiver of the condition of the sale by which David Schwartz & Company obtained possession of it from the former owners. Aside from that consideration, any defect in the title of the bailor could not be set up against him or against his consignee, by the bailee, unless the superior title had been asserted against the bailee. In this case the property was not taken from the carrier by virtue, or upon the assertion, of any superior title in the former owners. It was taken as the property of David Schwartz & Company, by means of legal process against them. For all purposes of this decision, therefore, we may lay out of view the claim that Schwartz & Company had not acquired title and right to transfer the property, and regard the plaintiffs as having become the absolute owners of it before the attachment.

The judge who tried the case decided, that, "as under the attachments the goods were taken out of the possession of the defendants" without collusion, negligence, or fraud on their part, "the performance of their contract to carry and deliver the goods was thus rendered impossible by the intervention of a superior power, which

necessarily excused them from such performance; that, upon the attachment by the sheriff of the goods, the same came into the custody of the law; whether they were the property of the plaintiffs or of David Schwartz & Company, they were in the custody of the law for adjudication;" and that the defendants could not be held liable for not transporting and delivering goods so taken from them. This ruling is in accordance with what might seem, at first sight, to be the decision of the Supreme Court of the United States in Stiles *v.* Davis, 1 Black, 101 [**363**]. The defendants' counsel insists that to hold otherwise would be in direct conflict with that decision.

We do not so regard the matter. In Stiles *v.* Davis the action was not brought upon the contract of carriage; nor for a violation, by the defendant, of his obligations as carrier. It was an action of trover for the conversion of the goods. The failure to deliver the goods at another place than that of their destination, upon a demand made there, with no denial of the plaintiffs' right, but merely for the reason that they were detained under attachment by legal process, would not be a conversion of the property. The case decides nothing more. The question, whether the same facts would constitute a good defence to a suit against the defendant for breach of his contract or obligation as common carrier, was not decided, and was not raised by the form of the action. The opinion, by Mr. Justice Nelson, does, indeed, assign, as a reason for the decision, that the goods "were in the custody of the law, and the defendant could not comply with the demand of the plaintiffs without a breach of it;" that "the right of the sheriff to hold them was a question of law, to be determined by the proper legal proceedings, and not at the will of the defendant, nor that of the plaintiffs." But this language must be interpreted with reference to the precise question then under consideration. In one sense, the property was in the custody of the law; so far, at least, that the surrender of its possession to the officer claiming to attach it upon legal process was not tortious on the part of the carrier, so as to subject him to the charge of converting it to his own use. But that custody was of no effect against any one having an interest in the property, not made party to the suit in which the process issued. It was not in the custody of the law in the sense in which property that is the subject of proceedings *in rem* is in the custody of the law, or property actually belonging to the party against whom the suit is brought. In personal actions, the attachment of property of another than a defendant in the suit is a trespass; and, as the true owner, the property is not regarded as in the custody of the law. It may be reclaimed by replevin; except where the replevin would bring State and federal authorities into conflict, as in Howe *v.* Freeman, 14 Gray, 566; s. c. 24 How. 450. The officer may always be held liable as a trespasser for its full value, notwithstanding the pendency, and without reference to the suit in which the attachment was made. The liability is ex-

pressly recognized in the closing paragraph of the opinion of Mr. Justice Nelson. See also Buck v. Colbath, 3 Wallace, 334. It does not appear, from the report, how far, if at all, the decision in Stiles v. Davis was affected by the fact that the carrier was made a party to the proceedings, as garnishee.

The present suit is brought against the defendants upon their contract as carriers. Assuming that the title to the property had vested in the plaintiffs, according to the finding of the facts at the trial, the attachment by the officer, in a suit against David Schwartz & Company, was a mere trespass. As against the plaintiffs, it was of no more validity than a trespass by any other unauthorized proceeding, or by an unofficial person. The carrier is not relieved from the fulfilment of his contract, or his liability as carrier, by the intervention of such an act of disposition, any more than he is by destruction from fire, or loss by theft, robbery, or unavoidable accident. In neither case is he liable in trover for conversion of the property; but he is liable on his contract, or upon his obligations as common carrier. The owner may, it is true, maintain trover against the officer who took the property from the carrier; but he is not obliged to resort to him for his remedy. He may proceed directly against the carrier upon his contract, and leave the carrier to pursue the property in the hands of those who have wrongfully taken it from him.

It will not be understood, of course, that these considerations apply to the case of such an attachment in a suit against the owner of the property. If the present plaintiffs had been defendants in the suit in which the attachment was made, the case would have stood differently. In that state of facts, the property would have been strictly in the custody of the law, so far as these parties were concerned, and the intervention of those legal proceedings would have deprived the plaintiffs of the right to require the delivery of the property to themselves until released from that custody.

But it is not so upon the state of facts shown by this report; and the ruling of the court against the plaintiffs upon this branch of the case was wrong. They are therefore entitled to a new trial upon the counts of their declaration relating to the car-load of "middlings;" and for that purpose the *Exceptions are sustained.*

KIFF *v.* OLD COLONY & NEWPORT R. CO.

117 Mass. 591. 1875.

Tort, with a count in contract, against the defendant as a common carrier, for a failure to deliver certain property described in the declaration as spirituous liquors, and alleged to be of the value of $713.

At the trial in the Superior Court, before Bacon, J., the plaintiff offered evidence tending to show that the property was his, was shipped by him, and came into the possession of the defendant as a common carrier, and was so in its possession at Boston in due course of transportation to Belfast, Maine; that the defendant failed to deliver it to him at Boston on demand.

The defendant then offered evidence tending to show that on the day the goods were received by it at Boston, they were taken from its possession by Robert S. Carroll, a duly appointed and qualified constable of the city of Boston, without fraud or collusion on its part, against its will, and with no knowledge that they were spirituous liquors, on a legal and valid writ of attachment, having an *ad damnum* of three hundred dollars, against the plaintiff, in the case at bar and in favor of William F. Nye.

The defendant then requested the judge to rule that if the goods were taken from its possession on a legal and valid writ of attachment against the plaintiff, by a proper officer, without fraud or collusion on its part, against its will, and with no knowledge that they were spirituous liquors, it was not liable for a failure to deliver the goods to the plaintiff. The judge declined so to rule, and ruled that the goods were not liable to be taken on a writ of attachment against the owners; that the facts offered to be shown by the defendant constituted no defence to this action, and that the only question for the jury was the value of the property at the time the defendant failed to deliver it to the plaintiff, to which the defendant alleged exceptions.

The judge, after verdict, reported the case for the consideration of this court; if the rulings for the plaintiff were sustained, judgment to be entered on the verdict; if not, the verdict to be set aside.

Gray, C. J. In Ingalls *v.* Baker, 13 Allen, 449, it was adjudged by this court, upon full consideration of the provisions of the General Statutes and of the previous legislation of the Commonwealth upon the subject now before us, that the Gen. Sts. c. 86, § 28, prohibiting the sale of intoxicating liquors, directly or indirectly, except as authorized in that chapter, and containing no exception of sales by officers under legal process, manifested the intention of the legislature that intoxicating liquors should not be sold on execution, and therefore such liquors could not be lawfully attached on mesne process.

In 1868, the legislature passed a new act to regulate the sale of intoxicating liquors, which provided that "nothing herein contained shall apply to sales made by sheriffs, deputy sheriffs, coroners, constables, collectors of taxes, executors, administrators, guardians, assignees in insolvency or bankruptcy, or any other person required by law to sell personal property;" and that "the eighty-sixth chapter of the General Statutes, and all acts and parts of acts inconsistent herewith, are hereby repealed." St. 1868, c. 141, §§ 1, 26.

But in 1869, the legislature again revised the whole law upon the subject, re-enacted the provision of the Gen. Sts. c. 86, § 28, and expressly repealed the previous statutes, including the St. of 1868, c. 141. St. 1869, c. 415, §§ 30, 65.

These statutes of 1868 and 1869 were passed after, and it must be presumed with full knowledge of, the decision in Ingalls *v.* Baker. The conclusion is inevitable that the legislature, when they repealed the St. of 1868, c. 141, and re-enacted the provision of the Gen. Sts. c. 86, § 28, intended that the exception introduced by the St. of 1868, and which had been held by this court not to exist under the General Statutes, should not exist for the future, and that the law of the Commonwealth should be as declared in Ingalls *v.* Baker. Low *v.* Blanchard, 116 Mass. 272, 274.

It follows that the plaintiff's liquors were not liable to attachment, the attachment of them was illegal, and the officer who attached them a trespasser. Bean *v.* Hubbard, 4 Cush. 85; Deyo *v.* Jennison, 10 Allen, 410, 413.

Every common carrier of goods being in the nature of an insurer, liable — upon grounds of public policy, and to guard against the possibility of fraud and collusion on his part — for all losses, even by accident, trespass, theft, robbery, or any kind of unlawful taking, and excepting only those arising by act of God or of public enemies, it also follows that it was rightly ruled at the trial that the facts offered to be shown by the defendant corporation constituted no defence to this action against it as a common carrier. 2 Kent Com. (12th ed.) 597; Coggs *v.* Bernard, 2 Ld. Raym. 909, 918; s. c. 3 Salk. 11; Edwards *v.* White Line Transit Co., 104 Mass. 159 [**372**]; Adams *v.* Scott, id. 164, 166 [**376**].

Judgment on the verdict for the plaintiff.

ADAMS *v.* SCOTT & TRUSTEES.

104 Mass. 164. 1870.

CONTRACT on a promissory note. The principal defendant, whose residence was at Norwich in Connecticut, appeared, answered, and filed a declaration in set-off. The parties summoned as trustees were an express company. In the Superior Court, "upon motion to charge them as trustees, it appeared that they as common carriers had taken a package securely sealed up, containing money, and directed to a person of the same name as the defendant at Norwich, Connecticut. The plaintiff filed allegations that the person to whom the package was addressed was in fact the principal defendant, and that the package was his property when intrusted to the carriers

and also when process was served. Issue being joined, the facts were found as alleged by the plaintiff. While the package was thus in transit and in the custody of the trustees in Boston, this process was served upon them." Lord, J., ordered the trustees to be charged, and they alleged exceptions.

Morton, J. The answers of the trustees disclose that they have in their possession a package supposed to contain money, sealed up, and directed to a person of the same name as the defendant at Norwich, Connecticut. Upon the trial of an issue upon additional allegations filed by the plaintiff, it was proved that the person to whom the package was addressed was in fact the defendant; that the package contained money; and that it was the property of the defendant when it was intrusted to the trustees and when the process was served upon them. The case thus differs from Bottom *v.* Clarke, 7 Cush. 487, in which the trustees were discharged because it did not appear that the locked trunk in their hands contained any goods, effects, or credits of the principal defendant which were attachable. In the case at bar, the sealed package is proved to contain money belonging to the defendant, and thus the trustees are brought within the provisions of the Gen. Sts. c. 142, § 21, "having goods, effects, or credits of the defendant intrusted or deposited in their hands or possession." They are therefore chargeable as trustees, unless the fact that the money was in their hands as common carriers, *in transitu*, exonerates them.

There is no reason why a common carrier should not be liable to the trustee process, in the same manner as other bailees are, unless the nature of his contract is such that a judgment charging him as trustee would not protect him against a claim of the defendant for a non-delivery of the goods at their place of destination. But we are of opinion that such judgment would be a sufficient excuse to the trustee for a failure to deliver according to his contract. The doctrine of the common law, that a carrier is responsible for all losses, except those occurring by the act of God or a public enemy, has no application to a case like the present. There has been no loss, but the defendant's property has been sequestrated by the law, to be applied to his use and benefit. Every man holds his property subject to be attached, and whenever property is attached in a suit against the owner, and taken into the custody of the law, it excuses the person having possession of it from performing his promise, express or implied, to deliver it to the owner. The law substitutes the delivery to its officers for a performance of his contract.

It is not a sound argument, therefore, to urge that these trustees should be discharged because otherwise they cannot perform their contract to deliver at Norwich. The necessary effect of every trustee process is, by diverting the property to the payment of the creditor, to prevent the trustee from strictly performing his contract with the defendant.

In the case at bar, the Superior Court has jurisdiction over the subject-matter and the parties, the defendant having appeared. A judgment against him and against the trustees will be valid and binding, and by the provisions of our statutes will acquit and discharge the trustees from all demands by the defendant for all goods, effects, or credits paid or delivered by them by force of such judgment. Gen. Sts. c. 142, § 37. We may reasonably presume that the same effect would be given to it in every other jurisdiction. Whipple *v.* Robbins, 97 Mass. 107.

This case is clearly distinguishable from Edwards *v.* White Line Transit Co., *ante*, 159 [372]. In that case, the property of the plaintiff, while in the hands of a common carrier, *in transitu*, was attached upon a writ against a third person. The attachment was clearly illegal, and the plaintiff thereby lost his property. The officer, though acting under color of legal process, was a mere trespasser; and the defendants were liable, under the rule of the common law, in the same manner as if they had allowed any other trespasser to take the goods out of their custody.

The case of Clark *v.* Brewer, 6 Gray, 320, cited by the trustees, is clearly distinguishable from the case at bar. In Clark *v.* Brewer the alleged trustee had no goods or effects of the defendant in his hands. He had contracted to deliver to the defendant in New York goods to a fixed amount at the market price; which goods would become the property of the defendant when delivered, and not before. The plaintiff sought to charge him as trustee by reason of this contract. But the court held that, as the provisions of the statute charging as trustee one who is bound by contract to deliver specific goods to the defendant at a certain time and place were not applicable to contracts for the delivery of goods at any place out of the State, the alleged trustee could not be charged. There was no provision of the statute by which he was chargeable.

The case at bar is different. The trustees have in their hands goods belonging to the defendant; they are not chargeable by reason of any contract to deliver goods to the defendant, but because they have in their possession his goods and effects and are thus brought directly within the provisions of the twenty-first section of chapter 142 of the General Statutes. The fifty-fourth section of the same chapter does not apply to this case; but it comes within the provision contained in the fifty-second section, that, when a person is charged as trustee by reason of goods of the defendant which he holds, he shall deliver the same to the officer who holds the execution.

For the reasons we have stated, we are of opinion that the trustees must be charged.

Exceptions overruled.

MONTROSE PICKLE CO. *v.* DODSON & HILLS MANUF. CO.

76 Iowa, 172. 1888.

THIS is an action upon an account for merchandise sold and delivered by the plaintiff to the Dodson & Hills Manufacturing Company, defendant. An attachment was issued upon the ground that the defendant was a non-resident of the State; and the Diamond Jo Line of steamers, a corporation, was garnished in the action, upon the claim or supposition that it had property in its possession belonging to the defendant, which was liable to attachment. The garnishee answered, denying that it had any property in its custody subject to the writ. Issue was taken upon the answer of the garnishee, and a trial was had by the court, and a judgment was rendered discharging the garnishee. Plaintiff appeals.

ROTHROCK, J. At the time the action was commenced the plaintiff was a resident of this State. The defendant was a non-resident of the State, and a resident of the State of Missouri. Service of the original notice and of the notice of garnishment was made personally on the defendant in St. Louis, in that State. The defendant made no appearance in the action, and a default was entered against it, and what appears to have been a personal judgment was rendered upon the default. It is not important to determine the effect of the judgment rendered upon service of the original notice out of the State. It is not a material question in the case. The Diamond Jo Line of steamers is an Iowa corporation, with its principal place of business at the city of Dubuque. It is a common carrier of freight and passengers upon steamers to and from all points on the Mississippi River between St. Paul, Minn., and St. Louis, Mo. On the thirtieth day of September, 1887, said steamer company received on board of one of its boats, at Alexandria, Mo., some five hundred or six hundred barrels of pickles, for transportation to St. Louis. The property was shipped by the Dodson & Hills Manufacturing Company, at Alexandria, to the Dodson & Hills Manufacturing Company at St. Louis. The pickles were loaded on the steamer on the forenoon of that day. On the same day, and while the steamer, with the property in dispute on board, was on its way down the river to its destination, the garnishment notice was served on the steamer company at Dubuque, and on one of its agents at Keokuk.

The question to be determined is whether the property was liable to attachment by garnishment. The Superior Court held that the garnishee was not liable, because the property was not within the jurisdiction of that court; that the defendant's title thereto was not doubtful; that it was capable of manual delivery, and, if within the

jurisdiction of the court, it should have been levied upon and taken into custody by the officer executing the writ of attachment; and that it was not the subject of garnishment. This is the sole question presented to this court for determination. The ground of the attachment was that the defendant was a non-resident of this State. An attachment issued upon this ground avails nothing, unless the defendant has property or debts owing to him within this State. Without such property or debts, there could be no service of the attachment, either by actual levy, or by the process of garnishment. It is not claimed by appellant that any jurisdiction of the property could be obtained by seizing it outside the State. The contention is that, as the garnishee is a resident of the State, the *situs* or location of the property in question must be held to be in this State. This rule has been held to apply to debts owing by the garnishee to the defendant. Mooney *v.* Union Pac. Ry. Co., 60 Iowa, 346. That was a case of garnishment of the wages of a railroad employee. The garnishee was held to be a resident of this State, and there was no contract that the wages due were to be paid in the State of Nebraska, where the employee resided and the garnishee had its principal place of business. It appears to us that the right to garnish the steamer company, and hold it for the value of the property in question in this case, presents a very different question. The law of attachment in this State does not contemplate that property not actually within the State, but located in another State, shall be the subject of garnishment. We need not cite the various sections of the statute upon the subject of attachment and garnishment. Its whole scope and tenor lead to the conclusion that the claim made by counsel for appellant cannot be sustained. The argument of the appellant is grounded upon the thought that when the garnishment notice is served, the relation of debtor and creditor at once arises between the garnishee and the defendant. It is true the statute provides that a judgment may be rendered against the garnishee if he does not deliver the property to the sheriff. This is a right given to the garnishee. He may at any time, after answer, exonerate himself by placing the property at the disposal of the sheriff. Code, sec. 2986. If property in a distant State may be reached by process of garnishment, in order to avail himself of this right the garnishee must transport the property to the sheriff holding the writ, and deliver it to him. The garnishee cannot be deprived of this right, and as he is an innocent party, he cannot be compelled to bring the property within the jurisdiction of the court. The facts in this case are as good an illustration of the fallacy of this claim as can be given. The steamer company had taken this property upon one of its boats, and was under way, bound under its contract of affreightment to deliver the same at St. Louis. To avail itself of its right under the above statute, it would be required to ship the goods back to Keokuk, make its answer, and deliver the

property to the sheriff. The law imposes no such an obligation upon a garnishee; and yet, under the claim made by appellant, the garnishee must either do this or become the debtor of the defendant for the value of the property. The law puts no such a hardship upon a garnishee. It is very different where a debt is garnished. It is a debt first and last. In such case the process of the law does not practically compel the garnishee to become a debtor against his consent. This identical question was determined by the Supreme Court of Wisconsin in the case of Bates *v.* Railway Co., 60 Wis. 296; 19 N. W. Rep. 72. In an elaborate opinion, in which many of the authorities cited by counsel in this case are reviewed, it was held that personal property under the control of a garnishee, but situated out of the State where suit is brought, cannot be reached by the process of garnishment. In that case, as in this, the property was in actual transit, and out of the State, when the garnishment notice was served. We do not think it necessary to do more than refer to that case, and the authorities therein cited. It appears to us in its reasoning to be eminently sound, and that no other conclusion could have been fairly reached; and the rule adopted has peculiar force when applied to an attempt to garnish a common carrier while transporting goods outside of the State where suit is commenced. As was said by Chief Justice Breese in Railroad Co. *v.* Cobb, 48 Ill. 402: "When the property has left the county, and is in transit to a distant point, though on the same line of railway, it would be unreasonable to subject the company to the costs, vexation, and trouble of such process, merely because it had received that to be carried which the law compelled it to receive and carry." It will be understood that we do not determine the question as to the right to garnish a carrier of property, where the same is within this State. *Affirmed.*

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8. REMEDIES AS AGAINST CARRIER.

a. *Who may sue.*

DAVIS *v.* JAMES.

King's Bench. 5 Burr. 2680. 1770.

THIS was an action against a common carrier, for not delivering goods sent by him; and the only question was, "In *whose name* the action ought to have been brought."

The fact was that Davis and Jordan, the present plaintiffs, were manufacturers of cloth, at Shipton-Mallet. And their declaration charged, that they being possessed of cloth, as of their own proper

goods, delivered the same to the defendant, being the common carrier, etc., and requested him to deliver it safely and securely, for them, to one Elizabeth Bowman at the Three Nuns, at White Chapel; which they undertook to do, for a reasonable price payable and paid by the said plaintiffs to the defendant: but the goods were lost, and never delivered. The defendant pleaded "Not guilty;" and the plaintiffs obtained a verdict.

The defendant's counsel (Mr. Sergeant *Davy*, Mr. Sergeant *Burland*, and Mr. *Hotckins)* moved for a new trial; objecting that the action ought to have been brought in the name of the *consignee* of the goods, and not in the name of the *consignors:* for that the consignors *parted with their property*, upon their delivering the goods to the carrier; and that *no property* remained in them *after* such delivery. And they cited as to the point of property, the case of Knight *v.* Hopper, Tr. 8, W. 3, cases *tempore*, Holt, Ch. J., pa. 8, and the case of Godfrey *v.* Furzo, 3 Peere Williams, 185, and Lee and others *v.* Prescott and some other cases.

Mr. Sergeant *Glynn* and Mr. *Mansfield*, of counsel for the plaintiffs, answered that the present question does not turn upon the *strict* property. The carrier has nothing to do with the vesting of the property: it does not lie in his mouth to say that the consignor is not the owner. He is the owner, with respect to the carrier; who has undertaken *to* him, and was *paid* by him. He was therefore servant to the consignor, but had no connection at all with the consignee. And many such actions have been brought by the consignor.

Lord MANSFIELD said, there was neither law nor conscience in the objection. The vesting of the property may differ according to the circumstances of cases; but it does not enter into the present question. This is an action upon the agreement between the plaintiffs and the carrier. The plaintiffs were to pay him. Therefore the action is properly brought by the persons who agreed with him and were to pay him.

Rule discharged unanimously.

DAWES *v.* PECK.

King's Bench. 8 Term R. 330 1799.

THIS was an action on the case by the consignor of goods against the defendant, a common carrier, for not safely carrying, according to his undertaking in consideration of a certain hire and reward to be therefore paid, two casks of gin from London to one Thomas Odey at Hillmorton in Warwickshire within the time limited by two regular payoffs, in consequence of which the casks of gin became

forfeited to the Crown and were seized. This case came on to be tried at the sittings in London after last Easter Term, when the plaintiff proved his case by showing the delivery of the casks to a person employed by the defendant at the usual place, where they were booked to be sent by the defendant's wagon and the usual price paid for booking by the plaintiff's servant. The casks were directed to "Mr. Odey Hillmorton, near Rugby, Warwickshire, by Peck's wagon." It appeared that they were afterwards sent by the wagon, and were left at the Crown Inn at West Haddon, which was the nearest place to Hillmorton in the road which the wagon travelled; and where, after laying some time, they were seized in consequence of the time mentioned in the permit for their removal being expired. The merits of the case as between the plaintiff and Odey the consignee, or in respect of the legality of the seizure, were not entered into; but the defendant's counsel in opening his case to the jury read a letter from the plaintiff to Odey, after the seizure was known, in which he said that the liquors sent "were in quantity and prices exactly conformable to your (Odey's) order; but by what authority they were ever left at the Crown Inn at West Haddon remains for the innkeeper or the carrier to explain or account for. All I have to observe is this, that the goods *having been sent conformably to your orders and by the carrier you directed*, I shall certainly look to you for their amount," etc. Upon reading this letter, which was admitted to be genuine, Lord Kenyon was of opinion that the action by the present plaintiff could not be supported; for that the legal right to the goods after such delivery was vested in the consignee, to whom alone the carrier was answerable, if at all; and therefore the plaintiff was nonsuited.

A new trial was moved for in Trinity Term last, and a rule *nisi* for setting aside the nonsuit was obtained which stood over till this term. And now

Erskine and *Raine* showed cause against the rule. A delivery of goods to a carrier *named by the consignee*, as in this case, is tantamount to a delivery to the consignee himself, and divests the consignor of the legal property in them, though he still retains an equitable right of stopping them while *in transitu* in case of the failure of the consignee. After such a delivery the property in these goods was altered and the goods were at the risk of the consignee; and so it was considered by the plaintiff himself, as appears by his letter to Odey; consequently the plaintiff can maintain no action for any loss or injury which happened to them after they became the property of another. In the cases of Davis *v.* James [5 Burr. 2680] [**381**] and Moore *v.* Wilson [1 Term R. 659] the ground of the decisions, that the consignors might maintain the action, was that they had made themselves responsible to the carriers for the price of the carriage. In the former of those Lord Mansfield said that there was no question in the case as to the vesting of the property;

for the action was founded on the agreement between the carrier and the plaintiffs who were to pay him. But there is nothing in this case from which any property in the plaintiff can be inferred whereon to found his action: because his own letter shows that he had renounced all property in the goods.

Gurney and *Yates*, contra. It does not follow that because the consignee may maintain an action against a carrier for the loss of goods, the consignor may not also have his remedy. The cases show that the action may be maintained by either. The reason of the thing is more in favor of the action by the consignor, for there is a privity of contract between him and the carrier; but there is no such privity between the latter and the consignee. Here, too, the booking was paid for by the consignor, which is evidence of a contract between him and the carrier. The carrier is ignorant of the particular agreement between the consignor and the consignee; and at all events the consignor is liable to the carrier for the price of the carriage, if the consignee do not accept the goods. Davis *v.* James, 5 Burr. 2680. The liability of the consignor to the carrier is a sufficient ground to maintain this action. Both the case in 5 Burr. and that of Moore *v.* Wilson proceeded on the admission that the legal property passed to the vendee by the delivery to the carrier. All the cases of stopping *in transitu* show that until a delivery in fact to the consignee a latent right to the goods remains in the vendor even as against the vendee: but whatever the question may be as between those, it ought not to be permitted to the carrier to dispute the property of the person from whom he received the goods.

Lord KENYON, C. J. I cannot subscribe to one part of the argument urged on behalf of the plaintiff: namely, that the right of property on which this action is founded is to fluctuate according to the choice of the consignor or consignee, and that consequently either of them may, at his pleasure, maintain an action against the carrier for the non-delivery of the goods. In my opinion the legal rights of the parties must be certain, and depend upon the contract between them, and cannot fluctuate according to the inclination of either. This question must be governed by the consideration, in whom the legal right was vested: for he is the person who has sustained the loss, if any, by the negligence of the carrier; and whoever has sustained the loss is the proper party to call for compensation from the person by whom he has been injured. The facts are these: a man in Warwickshire gave an order for goods from London, which he directed to be sent by a certain carrier, and the dealer in London delivered them, accordingly, to that carrier to be conveyed to the vendee. Upon this short statement there can be no doubt but that after such a delivery the vendee must stand to the risk. Then here the *damnum et injuria* are to him and not to the vendor, the plaintiff. I do not find that anything which I have advanced is

broken in upon by the two cases which have been relied upon in the argument: the distinction which is there taken I fully adopt. In the one case the action brought by the consignor against the carrier was sustained, because the consignor was to be answerable for the price of the carriage; he stood, therefore, in the character of an insurer to the consignee for the safe arrival of the goods. And the subsequent case of Moore *v.* Wilson proceeded on the same ground. It is not disputed but that the consignee might have maintained the action in this case: then if the consignee had recovered a verdict against the carrier how could such recovery by a stranger have been pleaded in bar to this action? And if it could not, and yet this action could be maintained, the consequence would be that the carrier would be liable to answer in damages to both for the same loss. Therefore common sense and justice as well as strict law are in favor of the objection made against the plaintiff's recovering in this action.

Grose, J. The plaintiff, who was at one time the owner of these goods, delivered them by the order of Odey to the defendant, a common carrier, for the purpose of having them conveyed to Odey. By such delivery they became the property of Odey; he was liable to be sued for the value of them; and it is admitted that he might have maintained an action for any loss or injury happening to them by the default of the defendant. It is true that, while the goods remained in the hands of the carrier, there was a latent right in the plaintiff to stop them *in transitu:* but that is in its nature an equitable right, though now grown into law; but the legal right was by the delivery to the carrier vested in the consignee, by whose order they were so delivered. But cases have been cited, wherein it was holden that the consignor might maintain the action: on looking into them, however, it appears that they proceeded on the ground of special agreements between the respective consignors and carriers. Now here there was no evidence of any such agreement; and the letter from the plaintiff to Odey excludes the idea of any such agreement, for the former therein insists that the property was vested in the consignee, whom he considered at all events answerable to him for the value. Then, after it appears that the plaintiff had renounced all right and property in the goods at the time, upon what ground can he claim an indemnity for the loss of what belonged to another? I am therefore of opinion that the action against the carrier ought to have been brought by the consignee of the goods, in whom the property was vested by the delivery to the carrier according to his own order.

Lawrence, J. Some stress has been laid on the circumstance of the consignor having paid the carrier for booking the goods, as evidence of a special contract between them, in order to bring this case within those which were cited at the bar; but that circumstance would not give a right of action against the carrier to recover

damage for the loss of the goods, if it appeared that they were the property of another person. And here it is admitted that the action might have been brought by the consignee in right of his property in them. It is true that in some special cases a man may make himself liable to either of two persons on account of the same interest; but that is not usual: and it is more consonant to the general principle of law to refer all transactions of agents to the principal on whose account they were entered into. Now here I consider that what was done by the consignor in respect of the booking was as the agent of the consignee, at whose risk the goods were sent. And, generally speaking, the carrier knows nothing of the consignor, but only of the person for whom the goods are directed, and to whom he looks for the price of the carriage upon delivery.

Le Blanc, J. It is admitted that the legal property of the goods was by the delivery to the carrier vested in the consignee, and that he might maintain the action: and upon examination of the cases referred to in support of the consignor's right of action, it appears that they proceeded upon the ground of a special agreement between the parties that the consignor was to pay for the carriage of the goods. But as there was no evidence of any such agreement in this case, I think that the nonsuit was proper.

Rule discharged.

FINN *v.* WESTERN R. CORP.

112 Mass. 524. 1873.

Contract against the defendant corporation, as a common carrier, for its failure to forward and deliver shingles to Joseph S. Clark, at Westfield. Writ dated June 28, 1867. The declaration alleged the delivery to the defendant, its neglect to forward, and the destruction of the shingles while in its possession.

At the second trial in the Superior Court, before Putnam, J., after the decision reported in 102 Mass. 283, the plaintiff testified that May 9, 1861, he received at Olean, in the State of New York, a written order for a quantity of shingles, from J. S. Clark of Southampton, Massachusetts, to be forwarded to him at Southampton; that he filled the order by shipping the shingles ordered on board the canal-boat "M. White," at Olean; that when he shipped the shingles, he filled in triplicate the following shipping bill: "Olean, May 13, 1861. Shipped for account of M. W. Finn, on board canal-boat 'M. White' of Niagara, N. Y., whereof James Smith is Master for the present trip, as follows: 100 bunches, 50 M. of 18 in., Sorted Shaved Shingles, marked J. S. C. — Extra. 150 bunches, 75 M. of 18 in., No. 1 Shaved Shingles, marked J. S. C.

360 bunches, 90 M. of 18 in., Extra Sawed Shingles, marked J. S. C. — Extra. In good order, to be delivered in like good order, without delay, to the Great Western Railroad Company or their Assignees, at Greenbush, N. Y. Consignee to pay freight on the delivery at the rate of seventy-five cents per M. for Shaved Shingles, and sixty-two and one-half cents per M. for the Sawed Shingles, $2.50 for towing less amount advanced Master, one hundred and fifty-two and fifty-one hundredths dollars, M. W. Finn, Consignor. James Smith, Master. $152.50;" that one of the bills was sent by mail to Clark, one was given to the master of the canal-boat, and one was retained by him; that the shingles were put up in bunches and were branded upon the flat surface of each bunch; that the brand upon some of the bunches was "J. S. C." and upon the rest was "J. S. C., Extra;" that upon about one bunch in six, he wrote with a lumberman's pencil, in letters plainly legible at a distance of twenty feet, the words "J. S. Clark, Southampton, Mass.;" that the shingles were forwarded by canal from Olean to Greenbush, to be forwarded from thence by the Western Railroad to Clark; that this was the usual mode of conveyance; that between the years 1858 and 1861 he had sent upon similar orders 6 or 8 lots of shingles to Clark, to Westfield or Southampton, by the same routes, marked in the same manner as the lot in question; that on June 6, 1861, he received from the agent of the Western Railroad a letter stating that the boat "M. White" had arrived at Greenbush with shingles, and asking for the name of the consignee; that upon the same day he wrote a letter in reply, in the post-office at Olean, in the presence of the postmaster, stating that the shingles were for J. S. Clark, of Southampton, Mass., and requesting them to be forwarded to him at once; that the letter was addressed to "The Agent of the Western Railroad Company, Greenbush, N. Y.;" that he delivered the letter to the postmaster personally, in the post-office at Olean; that by the ordinary course of mail the letter would arrive at Greenbush on the next day; that at the time of shipping the shingles, he drew upon Clark for the price of them; that the draft was duly accepted, and paid at its maturity, but whether it was paid before the fire or not, he did not know.

On his cross-examination, the plaintiff stated that with each of the prior lots of shingles, a shipping bill was given to the master of the boat, by which they were shipped, in which J. S. Clark, of Southampton or Westfield, was named as the person to whom the goods were sent, and a like bill was sent to Clark.

Benjamin Barker, a witness called by the plaintiff, testified that he helped the plaintiff mark the shingles as they were loaded on the canal-boat, at Olean, and that he marked, with a lumberman's pencil, on one bunch in every six or eight, the name and address, "J. S. Clark, Southampton, Mass.," in letters that could be plainly read at a distance of twenty or thirty feet.

The deposition of the postmaster at Olean was read in evidence, who testified to the mailing of a letter by Finn, June 6, 1861, addressed to the agent of the Western Railroad, but that it was directed to East Albany, N. Y., and that his register of that day showed one letter sent to East Albany, N. Y., and that letter was mailed by the postmaster personally, and by him sent out of the office by the eastern mail.

It appeared that the proper address for the defendant's agent was either Greenbush or Albany; that East Albany was a village in the town of Greenbush, and the western terminus of the defendant's road, and that Greenbush was sometimes known as East Albany, and that letters addressed to East Albany had at different times been received at and delivered from the post-office at Greenbush, and that letters addressed to Green, the defendant's agent at East Albany, had been frequently received by him from the post-office at Greenbush.

The facts as to the shipment of the prior lots of shingles were also testified to by Clark, substantially as by the plaintiff, though he did not testify that he received shipping bills with them.

Asa C. Parker, the defendant's station agent at Westfield, testified that he knew of the receipt of the prior lots over the road, but that no bills of lading or any shipping bills accompanied any of these that he ever saw.

Thomas L. Green testified that he was agent for the defendant at Greenbush in 1861, and had been for some time prior to 1858, and was still its agent there; that no one but himself and George H. Penfield opened letters addressed to him or to the agent of the defendant at Greenbush or Albany, and that he never received or saw the letter of June 6, testified to having been sent by the plaintiff, and that up to the time of the fire he did not know the name of the consignee; that when the shingles in controversy arrived at Greenbush, the master of the canal-boat exhibited to him the shipping bill before mentioned, and there being no person named therein to whom the shingles were to be delivered, he declined to receive them until, at the solicitation of the master, he agreed to take them upon storage, and that he wrote the letter mentioned by the plaintiff as having been received by him, before he agreed to take them on storage, and as soon as he saw the way-bill; that a day or two afterwards he examined the shingles and turned over one-third of the bundles, so that he could see all sides of them, in order to see if there was a name of any consignee, or any direction upon them, and found no mark or direction upon them except "J. S. C.," and "J. S. C. Extra;" that he had no recollection of having seen either of the prior lots testified of by Finn and by Clark, that he had no recollection of any of the prior consignments, and only knew from the books that they were forwarded; that it at that time was, and still is, a custom of the defendant corporation that all freight com-

ing to their road by way of the Erie Canal, as these shingles did, should be governed by the directions contained in the shipping bill accompanying them, and not by the marks upon the goods.

On cross-examination, he admitted that he received before the fire two letters from Clark, and one from Parker, the station agent at Westfield, in relation to the shingles in controversy.

The plaintiff and William G. Bates both testified that at two former trials of the case of Finn *v.* Clark, in which the same facts were in issue, Green did not testify as to his receiving the shingles on storage, and did testify that he had seen the name of J. S. Clark, Southampton, in full, on some of the bunches of the former consignments.

The foregoing is all the material evidence in the case.

The defendant requested the court to rule that upon the whole evidence in the case the plaintiff was not entitled to recover.

That if the shingles were sent in pursuance of an order from Clark in Southampton, to Finn in Olean, to be forwarded by the usual conveyances to him in Southampton, and the shingles were so forwarded with proper directions, so that it was the duty of the defendant upon the receipt thereof to forward them, then the shingles belonged to Clark, and the plaintiff could not recover.

That if the shingles were ordered of Finn at Olean, by Clark, to be forwarded to him at Southampton, and were forwarded by the usual means of conveyance, properly directed to Clark, then the shingles belonged to Clark, and the plaintiff could not recover.

These rulings the court refused to make in the form requested, but instructed the jury at length as to the duties and liabilities of common carriers, and their obligations in forwarding freight, as applicable to the shingles in question, which instructions were not objected to by either party, and further instructed them that if the defendant's agent knew, by reason of the receipt of the letter alleged to have been sent to him, or by reason of his having seen the name and address of Clark upon the bundles, that the shingles belonged to and were intended for Clark, it was the duty of the defendant to forward them within a reasonable time thereafter, and that the plaintiff could not recover unless he satisfied the jury that the defendant's agent received the letter of June 6, or saw the full name and address of Clark upon the bunches of shingles, and that the jury might consider the fact of the former shipment from Finn to Clark as evidence upon the question whether or not the agent knew for whom the shingles were intended, provided they were satisfied that in such previous instances the freight was not accompanied with proper way-bills, disclosing its destination.

The jury returned a verdict for the plaintiff, and found, especially, upon the question submitted to them by the court, that Green did see the full name and address of Clark upon the bunches of shingles. The defendant excepted.

Wells, J. The only question argued by the defendant, upon these exceptions, is whether the action for loss of the property can be maintained by and in behalf of Finn. It is contended that if there was a delivery, with proper directions for the transportation, so as to charge the defendant with responsibility as carrier, then the title in the property had passed to Clark, the consignee; and the right of action for injury to it was in him alone. On the other hand, if proper directions for its transportation had not been given, then the defendant is not liable at all as carrier, according to the former decision in 102 Mass. 283. It is not contended that the defendant is liable as warehouseman. In either aspect of the case, upon this view of the law, no recovery could be had by Finn.

The jury having found that the defendant became responsible as carrier, the case is now presented only in that aspect. We think also that the facts, as disclosed by the present bill of exceptions, show that the title to the property had passed to Clark before the loss occurred; leaving in Finn at most only a right of stoppage *in transitu*.

The liabilities of a common carrier of goods are various; and when not controlled by express contract, they spring from his legal obligations, according to the relations he may sustain to the parties, either as employers, or as owners of the property. *Prima facie*, his contract of service is with the party from whom, directly or indirectly, he receives the goods for carriage; that is, with the consignor. His obligation to carry safely, and deliver to the consignees, subjects him to liabilities for any failure therein, which may be enforced by the consignees or by the real owners of the property, by appropriate actions in their own names, independently of the original contract by which the service was undertaken. Such remedies are not exclusive of the right of the party sending the goods, to have his action upon the contract implied from the delivery and receipt of them for carriage. This, in effect, we understand to be the result of the elaborate discussion of the principles applicable to the case in Blanchard *v.* Page, 8 Gray, 281. That decision may not be precisely in point, as an adjudication, to govern the case now before us; for the reason that there was a written receipt or bill of lading for carriage by water, and the plaintiffs were acting in the transaction as agents for the owners of the goods; yet the general principles evolved do apply, and are satisfactory to us for the determination of the present case.

When carrying goods from seller to purchaser, if there is nothing in the relations of the several parties except what arises from the fact that the seller commits the goods to the carrier as the ordinary and convenient mode of transmission and delivery in execution of the order or agreement of sale, the employment is by the seller, the contract of service is with him, and actions based upon that contract may, if they must not necessarily, be in the name of the consignor.

If, however, the purchaser designates the carrier, making him his agent to receive and transmit the goods; or if the sale is complete before delivery to the carrier, and the seller is made the agent of the purchaser in respect to the forwarding of them, — a different implication would arise, and the contract of service might be held to be with the purchaser. This distinction, we think, must determine whether the right of action upon the contract of service, implied from the delivery and receipt of goods for carriage, is in the consignor or in the consignee. In the case of Blanchard *v.* Page the action was maintained in the name of the consignors, who were merely the agents of the owners in forwarding the goods. But that was explicitly on the ground of the express contract with them, embodied in the receipt or bill of lading.

As already suggested, the consignee, by virtue of his right of possession, or the purchaser, by virtue of his right of property, may have an action against the carrier for the loss, injury, or detention of the goods, though not party to the original contract. Such action is in tort for the injury resulting from a breach of duty imposed by law upon the carrier; or, in the language of the early cases, upon "the custom of the realm."

There are many cases, both in England and in the United States, in which the doctrine appears to be maintained that, except when there is a special contract, a remedy for injury resulting from breach of duty by a carrier can be had only in the name and behalf of some one having an interest in the property at the time of the breach, which is injuriously affected thereby.

The rule might well be conceded, if the exceptions were not too restricted. It will hold good in actions of tort, because they are founded upon injury to some interest or right of the plaintiff. And the cases which support this view are mostly, if not altogether, actions of tort. This is true of the leading early cases from which the doctrine is mainly derived: Dawes *v.* Peck, 8 T. R. 330; also of Griffith *v.* Ingledew, 6 S. & R. 429; Green *v.* Clark, 5 Denio, 497, 13 Barb. 57, and 2 Kernan, 343; and does not appear from the report to be otherwise in Krulder *v.* Ellison, 47 N. Y. 36. In discussing the grounds of decision it seems to have been assumed by various judges, as we think, erroneously, that the right of recovery necessarily involved the question with whom the original contract of service was made. And the effort to make the inference of law as to that contract conform to what was deemed the proper decision as to the right to recover for the injury, has led to some statements of legal inference which appear to us to be somewhat overstrained. Thus in Dawes *v.* Peck it is said by Lawrence, J., that, in the payment of freight by the consignor, he is to be regarded as the agent of the consignee; that the carrier generally knows nothing of the consignor, but looks to the person to whom the goods are directed. In Freeman *v.* Birch, 1 Nev. & Man. 420, it is said by Parke, J.,

"In ordinary cases the vendor employs the carrier as the agent of the vendee." In Green *v.* Clark, 13 Barb. 57, it is said by Allen, J., that when the consignee is the legal owner, or the property vests in him by the delivery to the carrier "it is an inference of law, and not a presumption of fact, that the contract for the safe carriage is between the carrier and consignee, and consequently the latter has the legal right of action." But in the same case in the Court of Appeals, 2 Kernan, 343, it was regarded as immaterial by whom the contract was made, and whether the plaintiff was consignor or consignee, for the purpose of an action of case for negligence by which his property was injured.

In Griffith *v.* Ingledew, the dissenting opinion of Gibson, J., assuming that the contract of carriage formed the basis of the action, combats with great force of reasoning the proposition that a contract with the consignee is the legal result of the receipt of goods by a carrier, when no privity with or authority from the consignee is shown, and none professed by the consignor at the time, unless the direction of the goods to the address of the consignee can be taken to be such profession.

The whole force and effect of the reasoning in Blanchard *v.* Page is to the same direction. The ordinary bill of lading or receipt, given to the consignor by the carrier, simply expresses what is the real significance of the transaction independently of the writing. There is no reason for giving a different interpretation to, or drawing a different inference from, the acts of parties, because of a writing which is nothing but a voucher taken to preserve the evidence of those acts.

Whatever remedy is sought in contract must necessarily be sought in the name of the party with whom the contract is entered into, whether it be special, that is, express, or implied. The question then is simply this: In the absence of an express agreement, with whom is the carrier's contract of employment and service in respect of goods delivered to him by the seller to convey to the purchaser, when there is no privity or relation of agency between the carrier and the purchaser save that which springs from possession of the goods, and the seller has no authority to make a contract for the purchaser except what is to be implied from the agreement of purchase or the order for the goods?

The law imposes upon the carrier the duty to transport the goods, allows him a reasonable compensation, and gives him a lien upon the goods for security of its payment. It also implies a promise on the one part to carry and deliver the goods safely, and, on the other, to pay the reasonable compensation. These two promises form the contract. Each is the counterpart and the consideration of the other. If the contract of carriage is with the consignee, the reciprocal promise to pay the freight must be his also. Against this inference are the considerations that the seller is acting in his own

behalf in making the delivery, and the goods remain his property until the contract with the carrier takes effect. The title of the purchaser does not exist until that contract is made. It follows as a result. The carrier is not agent for either party, but an intermediate, independent principal. If made an agent of the consignee, his receipt of the goods cuts off the right of stoppage *in transitu* on the one hand, and satisfies the Statute of Frauds on the other. He has a right to look for his compensation to the party who employs him, unless satisfied from his lien. The fact that, as between seller and purchaser, the purchaser must ordinarily pay the expenses of transportation as a part of the cost of the goods, does not affect the relations of contract between the carrier and either party. We discover nothing in the nature of the transaction, and we doubt if there is anything in the practice or understanding of the community which will justify the inference that one to whom goods are sent by carrier, without direction or authority from him, other than an agreement of purchase or consignment, is the party who employed the carrier and is bound to pay him; unless he assumes such liability by receiving the goods subject to the charge.

The contract is made when the goods are received by the carrier. If it is then the contract of the consignee, it will not cease to be so, and become the contract of the consignor, by reason of subsequent events. Suppose, then, the seller exercises his right of stoppage *in transitu*. Is the purchaser still liable to the carrier for the unpaid freight? Suppose the contract of sale to be without writing and within the Statute of Frauds. The contract of the carrier is not within the statute, and the authority to the seller to make such contract in behalf of the purchaser need not be in writing. Is the carrier to look to the purchaser or to the seller for the freight? Or does it depend upon the contingency whether the contract of sale is affirmed or avoided? And if affirmed, and the carrier should deliver the goods without insisting on his lien, of whom must he collect it? The authorities hold, when the agreement of sale is within the Statute of Frauds, that the contract of the carrier is with the consignor. Coombs *v.* Bristol & Exeter Railway Co., 3 H. & N. 510; Coats *v.* Chaplin, 3 Q. B. 483.

We do not think the carrier's contract and right to recover his freight can be made to depend upon what may prove to be the legal effect of the negotiations between consignor and consignee upon the title to the property which is the subject of transportation. His contract must arise from the circumstances of his employment. He has a right to look for his compensation to the party who required him to perform the service by causing the goods to be delivered to him for transportation. And that party, unless he is the mere agent of some other, may enforce the contract, and sue for its breach by the carrier.

One who forwards goods in execution of an order or agreement

for sale is not a mere agent of the purchaser in so doing. He is acting in his own interest and behalf, and his dealings with the carrier are in his own right and upon his own responsibility, unless he has some special authority or directions from the purchaser, upon which he acts.

The plaintiff in this case is therefore entitled to maintain his action upon the contract; and we think there is no sufficient reason shown to prevent his recovering the full value of the property destroyed. If Clark was the owner at the time, and his interest has been in no way satisfied or discharged, the plaintiff will hold the proceeds recovered in trust for his indemnity. Clark might have prosecuted an action of tort in his own name, and recovered the value of his property lost; in which event the damages in Finn's suit would have been nominal, or reduced to whatever amount of actual loss he suffered. But it is not pretended that Clark has ever brought any suit or made any claim upon the defendant, although knowing of the pendency of this suit, and having testified as a witness in the same; and all claim by him is long since barred. It is to be presumed that he acquiesces in the recovery by Finn. If there were any doubt upon this point, we might order a new trial upon the question of damages only. As there is none, the judgment must be upon the verdict.

Exceptions overruled.

KRULDER *v.* ELLISON.

47 N. Y. 36. 1871.

Appeal from judgment of the General Term of the Supreme Court, in the second judicial department, affirming a judgment in favor of plaintiff entered upon a verdict.

This action is brought to recover the value of a barrel of spirits shellac delivered to defendants, who were common carriers upon the canal, consigned to Newell & Turpin of Rochester, and alleged to have been lost by the defendants. The shellac was sent by a boat of defendants pursuant to the following order: —

"Send us, *on* canal, one barrel imitation shellac, such as you sent us last.

"Newell & Turpin, Rochester."

Upon the shipment, plaintiff sent a bill of sale to the consignees. When the barrel arrived at Rochester it was empty, and was reshipped to the plaintiff and received by him. Defendants' counsel asked the court to charge, that if plaintiff sold the barrel of varnish to Newell & Turpin to be delivered to them upon defendants' boat,

upon such delivery the title passed to Newell & Turpin, and the plaintiff could not recover. The court declined so to charge, and defendants excepted.

PECKHAM, J. Had the plaintiff, the vendor of the goods, the right to maintain an action for their loss? Here the evidence shows that Newell & Turpin, of Rochester, had ordered the goods from plaintiff, of New York City, to be sent to them "*via* canal, such as you sent last." Plaintiff sent them a bill by mail of the purchase, and shipped the goods "*via* canal," by defendant's boat. Plaintiff also remitted to the purchasers a bill of sale of the goods.

The presumption of law is, that the consignee is the owner of the goods in the absence of any evidence on the subject, and is the proper party to sue, for their injury or loss. Sweet *v.* Barney, 23 N. Y. 335 [**318**]; Price *v.* Powell, 3 Comst. 322; Everett *v.* Saltus, 15 Wend. 474; Ang. on Carriers, § 497, and cases cited.

There have been decisions qualifying this rule as to the proper party to sue, some holding that an action might be maintained by the consignor where he had made a special contract for the transportation.

In Moore *v.* Wilson, 1 Tr. R. 659, an action was sustained by the consignor against a carrier, where it appeared that the consignee had agreed with the plaintiff to pay for the transportation, Buller, J., holding that the agreement was between the "consignor and the carrier, the former of whom was, by law, liable." One case only is referred to; this was in 1787, in a note, 1 Atk. 248, where the Lord Chancellor declares the rule to be the other way; and that such an action would not lie.

In Joseph *v.* Knox, 3 Camp. 320, where goods had been shipped by plaintiff, an agent of the owner, who resided abroad, to be forwarded to a given place, and the freight paid by the agent and consignor, a recovery was allowed by Lord Ellenborough, at *nisi prius*, on the ground of the special contract. This in 1812. So in Davis *v.* James, 5 Burr. 2680 [**381**], a like rule was held where the consignor agreed to pay, and paid the carrier in 1770. In Dawes *v.* Peck, 8 Durn. & E. 330 [**382**], it was unanimously held, after full citation of authorities and consideration, that an action by the consignor would not lie for the loss of the goods, when they had been delivered to a particular carrier by order of the consignee, though he paid for booking the goods. Lord Kenyon, Ch. J., in delivering the opinion of the court, observed (K. B.): "This question must be governed by the consideration in whom the legal right was vested, for he is the person who has sustained the loss." The court held, that this booking was done as the agent of the consignee. This in 1799. In Brower *v.* Hodgson, 2 Camp. 36, a like decision at *nisi prius*, by Lord Ellenborough, where the goods were shipped by order, and on account of the consignee, as appeared by the bill of lading. So held, on the ground that the property was in the con-

signee, from the time of delivery, on board the vessel. This in 1809.

In Dutton *v.* Solomonson, 3 Bos. & Pul. 582, same doctrine. Lord Alvanley, Ch. J., expressed his surprise that the point should be questioned, as he said it appeared to him to be a proposition as well settled as any in the law, that if a tradesman order goods to be sent by a carrier, though he names no particular carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser. The whole property immediately vests in him; and he alone can bring an action for any injury done to them.

In 1803, in Freeman *v.* Birch, 1 Nev. & Man. 420, a laundress sent linen she had washed to the owner in London, and paid the carriage. Lost by the carrier, the action by laundress sustained on the ground that she had a special property in the linen; but admitted by both justices, Littledale and Parke, that if there be a complete sale the property is out of the vendor altogether. There the vendor transmits as agent for the vendee.

Excepting cases of special contract, where it has formerly been held that the consignor may bring the action, I think the cases agree substantially that the action must be brought in the name of the consignee only, as the owner; and that the owner alone can bring the action. Angell on Carriers, § 497. In such case, he and not the consignor must bring the action, for the consignor has his remedy against the purchaser. Id. Where the contract of purchase and sale is not valid or complete by reason of the Statute of Frauds, the goods being over the value of £10, and the title, therefore, still vests in the consignor, though the goods have been delivered to the carrier, no acceptance, and all still vesting in parol, the action must be brought by the consignor. Coombs *v.* The Br. and Ex. R. Co., 3 Hurl. & Nor. 510. But all the judges, in delivering opinions, admitted the rule to be, that the consignee must have brought the action had the order been in writing, and the sale valid. The question was whether the property passed to the vendee. If it did, he must sue.

In 1858, see Potter *v.* Lansing, 1 J. R. 215. That the property passed to the consignee, in the case at bar on its delivery to the carrier "*viz* the canal," is entirely clear. People *v.* Haynes, 14 Wend. 546; Ang. on Car. § 497; Smith's Merc. Law, 290, 5th ed., 2 Kent's Com. 8th ed., p. in mar., 499, and cases cited. There is nothing disclosed in the case to qualify or modify that title. In the language of the books, it is a complete sale. No special contract by the vendor with the carrier, and no payment of the price of transportation if either could affect the title of the vendee. I think it clearly could not. The order being positive and in writing, and stating the mode of conveyance, where the goods were delivered to the carrier pursuant to that order, the title passed absolutely to the vendee, subject to the right of stoppage *in transitu*, and it gave

no right of action to the vendor to sue for the loss of the vendee's goods, though the vendor, as agent for vendee, paid the carriage, or in like character, specially contracted with the carrier to transport. Had the consignor agreed with the consignees to deliver the goods to them at Rochester, the rule would be different. Then the consignees would not be the owners till delivery at Rochester. But upon what principle a vendor can sue for the loss of another's goods, it is difficult to see.

In this case the right of action being in the vendee under the facts disclosed, the return of the empty barrel to the vendor, and his sending on another in no manner affected that right, either by extinguishing or by assigning it to the consignor.

Judgment should be reversed, and new trial ordered, costs to abide event.

FREEMAN *v.* BIRCH.

King's Bench. 1 Nev. & Man. 420. 1833.

Case against a carrier for negligence. At the trial before Patterson, J., at the sittings for Middlesex in this term, the following facts appeared: —

The plaintiff, a laundress residing at Hammersmith, was in the habit of sending linen to and from London by the defendant's cart, which travelled from Chiswick to London. A basket of linen belonging to Spinks was sent by the defendant's cart, and on its way to London part of its contents were either lost or stolen. Spinks did not pay the carriage of the linen. It was objected on the part of the defendant that the present action was misconceived, and that the action should have been brought by the owner of the linen. The learned judge overruled the objection, and a verdict was found for the plaintiff.

Heaton now moved for a new trial on the ground of misdirection. The action should have been brought by the owner of the linen, and not by the laundress. It is laid down in Selwyn's Nisi Prius, p. 405, that the action against a carrier for the non-delivery or loss of goods must be brought by the person in whom the right of property in goods is vested. [Parke, J. The person who employs the carrier must bring the action.] The action against the carrier must be brought by the person in whom the legal right was vested, Dawes *v.* Peck, 8 T. R. 330 [**382**]. [Parke, J. The circumstance of the legal right being in one person, may be evidence of employment by that person.] In Dawes *v.* Peck, the action was brought by the vendor of the goods against the carrier; the vendee had named the carrier, and it was holden, that because the legal right to the goods had

vested in the vendee, he should have brought the action. Again, in Dutton *v.* Solomonson, 3 Bos. & Pull. 584, it was held, that where goods were ordered by a tradesman to be sent by a carrier, the delivery to the carrier vested the property in the purchaser, and he alone could maintain an action against the carrier for the loss of the goods: King *v.* Meredith, 2 Camp. 639. This action therefore is improperly brought.

Littledale, J. In the cases cited, the property in the goods was entirely gone out of the vendor. In this case the laundress retained a special property in the goods.

Parke, J. I am of the same opinion. In the case of the vendor and vendee, if the goods are, whilst the carrier has the care of them, to be at the risk of the vendor, he must bring the action against the carrier. In ordinary cases the vendor employs the carrier as the agent of the vendee. See Davis *v.* James, 5 Burr. 2680 [**381**]; Moore *v.* Wilson, 1 T. R. 659.

Rule refused.

ELKINS *v.* BOSTON & MAINE R.

19 N. H. 337. 1849.

Assumpsit. The declaration alleged that on the twenty-first of April, 1847, the defendants were common carriers of goods for hire from Andover, Mass., to Exeter; that the plaintiff delivered to them an overcoat to be carried from Andover to Exeter, and delivered to the plaintiff for a reasonable reward to be paid therefor, in consideration of which the defendants received the coat and undertook to transport and deliver it accordingly, which they have neglected and refused to do.

At the trial upon the general issue it appeared in evidence that the overcoat belonging to the plaintiff, whose name is Charles D. Elkins, was rolled up in a bundle with another overcoat, belonging to Jonathan Elkins, and a label put upon the bundle with this address upon it: "Jonathan Elkins, Exeter, N. H." The bundle was left by Jonathan Elkins in the common room of the depot at Andover, and the depot-master was requested by him to send the bundle by the next passenger train to Exeter, which he said he would do.

The defendants objected that the evidence did not support the declaration, but varied materially therefrom; but the court ruled it to be sufficient.

The jury returned a verdict for the plaintiff, which the defendants moved to set aside.

Gilchrist, C. J. The only question in the case is whether the evidence supports the declaration. It is alleged that the plaintiff

delivered to the defendants an overcoat, to be carried from Andover to Exeter, and delivered to the plaintiff. It appeared that two overcoats were rolled up in a bundle, one of which belonged to the plaintiff and the other belonged to Jonathan Elkins; that the bundle was directed to Jonathan Elkins, and left by him at the depot. The only question properly raised by the case is whether upon these facts the plaintiff may maintain an action against the defendants.

In the case of Weed *v.* The Saratoga and Schenectady Railroad, 19 Wend. 534, cited by the counsel for the defendants, the declaration alleged that the railroad company promised the plaintiffs to carry for the plaintiffs a trunk containing certain goods, etc., and bank bills, but that they carelessly lost the trunk and its contents. The second count alleged an undertaking to carry the trunk and its contents. The evidence showed that the plaintiffs' clerk, who was travelling, directed his baggage to be put into the proper car, but on his arrival at the place of his destination, he found that one of his trunks was lost, containing $285 belonging to the plaintiffs, which he had retained for his travelling expenses. The trunk belonged to one Martin. It was said by Cowen, J., that the variance was material. "The contract, as set forth, was to carry the trunk and money of the plaintiffs. The proof is that the trunk belonged to Martin, a stranger, nor was it shown that the plaintiffs had any connection with it. If the trunk were Barnes' (the clerk), the variance would be the same, and so I think if he had hired or borrowed it of Martin for his own use." . . . "The proof is at most of a contract with the plaintiffs to carry the money only. The declaration, then, fails in describing correctly a special executory contract, wherein great exactness is always demanded. Where the declaration is on a promise to do several things, and only one is proved, this is a variance. . . . The whole contract in the case at bar was made ostensibly with Barnes. If in legal construction it can be turned in favor of the plaintiffs, it must be in respect to their ownership of the articles undertaken to be conveyed, and there can be no pretence that the trunk of a stranger, Martin, or the trunk of Barnes, in which the plaintiffs had leave to deposit their money, would be comprehended within the principle."

Thus far the decision is not an authority for the defendants. The question of variance was distinctly raised and decided, although it finally turned out not to be very material, inasmuch as the plaintiffs were permitted to amend, by striking out the trunk from the declaration. But the learned judge goes farther, and after raising the question whether Barnes was not more than a mere agent, and was not a bailee, having himself an interest in the money for his travelling expenses, says, "It is doubtful, at least, whether a promise to carry for a bailee can enure to the benefit of the bailor," although that question did not arise in the case. Upon this question there are several decisions worthy of consideration.

In the present case the coat, which is the subject of this action, being in the possession of Jonathan Elkins, the latter must be regarded as the bailee, and the plaintiff as the bailor. It is immaterial for what particular purpose the plaintiff's coat was in the possession of Jonathan Elkins. The purpose probably was that the latter might cause it to be forwarded to the plaintiff. In such a case it is clear that the bailee has such a continuing interest in the goods, until their arrival at the place of destination, as to entitle him to sue the carrier in case they are lost or damaged on their passage. Thus, in the case of Freeman *v.* Birch, 1 Nev. & Man. 420 [397], which was an action against a carrier for negligence, it appeared that the plaintiff, a laundress, residing at Hammersmith, was in the habit of sending linen to and from London by the defendant's cart, which travelled from Chiswick to London. A basket of linen belonging to one Spinks was sent by the defendant's cart, and on its way to London part of its contents were either lost or stolen. Spinks did not pay the carriage of the linen. It was objected on the part of the defendant that the present action was misconceived, and that the action should have been brought by the owner of the linen. But the objection was overruled and a verdict was found for the plaintiff. A motion was made for a new trial, but refused by the Court of the Queen's Bench on the ground that under the circumstances the bailee retained a special property in the goods sufficient to support the action.

The property in articles bailed is for some purposes in the bailee and for some in the bailor. The right of action must partake of the same properties, and must so continue until it is finally fixed and determined by one or the other party appropriating it to himself. The decision in Freeman *v.* Birch, although it clearly establishes the right of a bailee to sue, does not necessarily exclude the bailor from bringing an action, if he chooses to anticipate the bailee in so doing. The rule in such cases is stated by Parke, B., to be, that either the bailor or the bailee may sue, and whichever first obtains damages, it is a full satisfaction. Nichols *v.* Bastard, 2 Cro. Mees. & Ros. 660.

The principle appears to be well settled, that if it is not expressed that an agent contracts in behalf of another, and the name of the principal is not disclosed by him, a suit may be maintained in the name of the principal. In the present case, Jonathan Elkins was clearly the agent of the plaintiff, and the name of the plaintiff was not disclosed by him. This principle is recognized in the case of Sims *v.* Bond, 5 B. & Ad. 389, where Lord Denman says, "It is a well-established rule of law, that where a contract, not under seal, is made with an agent in his own name, for an undisclosed principal, either the agent or the principal may sue upon it; the defendant, in the latter case, being entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent had

been the contracting party." In the case of Higgins *v.* Senior, 8 Mees. & Wels. 834, it was held that the suit might be maintained on the contract, either in the name of the principal or of the agent, and that, too, although required to be in writing by the Statute of Frauds. Beebe *v.* Robert, 12 Wend. 413; Taintor *v.* Prendergast, 3 Hill, 92. The same principle was adopted by the Supreme Court of the United States, in the memorable case of the loss of the steamer "Lexington," in Long Island Sound. In the case of the New Jersey Steam Navigation Co. *v.* The Merchants' Bank, 6 Howard, 344, the bank had delivered to Harnden, an express agent, a large amount of specie for transportation, by whom it was delivered to the Steam Navigation Co., who were then running the "Lexington" between New York and Stonington. It was held that, notwithstanding the contract of affreightment was made by Harnden with the company personally for the transportation of the specie, it was, in contemplation of law, a contract between the bank and the company, and although Harnden made the contract in his own name, and without disclosing the name of his employers at the time, the bank might maintain a suit upon the contract directly against the company. So where the plaintiff agreed with B, a common carrier, for the carriage of goods, and B, without the plaintiff's directions, agreed for the carriage with C, who, without the plaintiff's knowledge, agreed with D, a third carrier, it was held that the plaintiff might maintain an action against D, for not delivering the goods, and that by bringing the action the plaintiff affirmed the contract made with D, by C, and could not afterwards recover from B. Sanderson *v.* Lamberton, 6 Binn. 129.

Upon the principles above stated, our opinion is that the plaintiff may maintain this action.

Judgment on the verdict.

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b. *Form of Action.*

DALE *v.* HALL.

King's Bench. 1 Wils. 281. 1750.

Action upon the case against a shipmaster or keelman who carries goods for hire from port to port; the plaintiff does not declare against him as a common carrier upon the custom of the realm, but the declaration is, that the defendant at the special instance of the plaintiff undertook to carry certain goods consisting of knives and other hardware safe from such a port to such a port, and that in consideration thereof the plaintiff undertook and promised to pay him so much money, that the goods were delivered to the defendant

on board his keel, that the goods were kept so negligently by him that they were spoiled, to the plaintiff's damage; upon the general issue *non assumpsit:* this cause came on to be tried before Justice BURNETT, and the plaintiff proved the goods were all in good order and clean when they were delivered on board, and that they were damaged by water and rusted to the value of 24*l.* this was all the plaintiff's evidence.

For the defendant it was insisted at the trial that as the plaintiff had proved no particular negligence in the defendant, that he might be permitted to give in evidence that he had taken all possible care of the goods, that the rats made a leak in the keel or hoy, whereby the goods were spoiled by the water coming in, that they pumped and did all they could to prevent the goods being damaged, which evidence the judge permitted to be given, and thereupon left it to the jury, who found a verdict for the defendant.

It was now moved for a new trial by Mr. *Clayton* and Mr. *Ford* for the plaintiff, who insisted that the evidence given for the defendant ought not to have been received.

FOSTER (Justice) reported that BURNETT (Justice) was doubtful whether the evidence given by the defendant was admissible or not, and submits *that* to the court; but if it was admissible, he is very well satisfied with the verdict.

Sir *Thomas Booth* and Sergeant *Booth*, for the defendant, insisted that, this declaration not being upon the custom of the realm, but upon a particular contract, and that the breach assigned being, that by the negligence of the defendant the goods were spoiled, that therefore *negligence* is the very *gist* of this action, and the defendant has proved there was no negligence; indeed, if the declaration had been that the defendant promised to keep safely the goods as well as to carry them safely, he must have kept them safely at all events.

LEE, Chief Justice. This is a nice distinction indeed; I am of opinion that the evidence given for the defendant was not admissible; the declaration is, that the defendant undertook for *hire* to carry and deliver the goods safe, and the breach assigned is that they were damaged by negligence; this is no more than what the law says, everything is a negligence in a carrier or a hoyman, that the law does not excuse, and he is answerable for goods the instant he receives them into his custody, and in all events, except they happen to be damaged by *the act of God or the King's enemies;* and a promise to carry safely is a promise to keep safely.

WILLIS, Justice, of the same opinion.

DENISON, Justice. The law is very clear in this case for the plaintiff; the declaration upon the custom of the realm is the same in effect with the present declaration: in the old forms it is, that the defendant *suscepit*, etc., which shows that it is *ex contractu;* in the present case the promise to carry safely need not be proved, the

law raises it, the breach is very right that he did not deliver them safely, but so negligently kept them that they were spoiled.

Foster of the same opinion; and a new trial was granted.

BAYLIS *v.* LINTOTT.

Common Pleas. L. R. 8 C. P. 345. 1873.

This was an application for a rule to tax the costs of the action under the following circumstances.

The declaration in substance stated that the defendant was the proprietor of a certain hackney carriage, which said hackney carriage was at the time, etc., under the care, management, and direction of defendant's servant, and plying for hire within the limits of the Metropolitan Police District, and thereupon, and after the passing of the Act of Parliament made and passed in the seventh year of her present Majesty, "An Act for regulating Hackney and Stage Carriages in and near London," the plaintiff, at the request of the defendant, hired the said hackney carriage of the defendant to convey and carry the plaintiff and her luggage from and to certain specified places, and thereupon, in consideration of the premises, and that the plaintiff, together with her said luggage, would, at the request of the defendant, become and be a passenger to be carried and conveyed in the said hackney carriage as aforesaid, and of certain reward to the defendant in that behalf, he, the defendant, as and being such proprietor of the said hackney carriage as aforesaid, then promised the plaintiff to convey her and her said luggage safely and securely from and to the places specified, and accepted her and her said luggage to be so carried; but the defendant, not regarding his duty as such proprietor of the said hackney carriage as aforesaid, or his said promise, did not nor would carry or convey the plaintiff and her said luggage safely and securely, but so carelessly and negligently behaved and conducted himself by his said servant in that behalf in and about the premises, that by and through the mere carelessness, negligence, and improper conduct of the defendant by his said servant, and not otherwise, part of the plaintiff's said luggage became and was wholly lost to the plaintiff. Plea: payment into court of £15. Replication that £15 was not sufficient. The plaintiff at the trial obtained a verdict for £5 above the amount paid into court, and the question therefore arose whether the plaintiff having recovered a sum not exceeding £20 was deprived of costs by virtue of the County Courts Act, 1867, 30 & 31 Vict. c. 142, s. 5.

Kydd, in moving for a rule *nisi*, contended that the action must

be considered as founded on tort. The case of Tattan *v.* Great Western Ry. Co.[1] decided, with reference to the question of costs, that an action against a common carrier for not safely delivering goods is an action of tort founded on the custom of the realm, and not one of contract. It is submitted that the position of a hackney-carriage proprietor with respect to the luggage of persons hiring his carriage is that of a common carrier. The declaration must be treated as one in tort; the statement in the declaration of the contract is mere inducement, showing the facts from which the duty arose; the cause of action is the breach of duty.

Bovill, C. J. I think there should be no rule. The provisions of the County Courts Act, 30 & 31 Vict. c. 142, s. 5, deprive the plaintiff of costs if he does not recover a sum exceeding £20 in actions founded on contract, or £10 in actions founded on tort. The defendant paid into court the sum of £15, and the jury awarded the further sum of £5, so that in the whole the sum recovered did not exceed £20. The question thus arises whether the present action is founded on contract within the meaning of the section. On looking to the form of the declaration, it appears to me clear that the cause of action therein alleged is one founded on contract. In many cases previous to the introduction of the present rules of pleading it became material to consider, with a view to preventing misjoinder of counts, whether a count could be framed in case instead of *assumpsit*. And it was a common practice to treat causes of action founded on contract as actions of tort, and to frame declarations alleging a contract and a duty arising therefrom, and complaining of a breach of such duty by neglect to perform the contract. Here the contract alleged in the declaration would be implied by law on the hire of the carriage, and the cause of action is therefore rightly put as founded on the contract. In the case of Tattan *v.* Great Western Ry. Co.,[1] which was cited, the Queen's Bench treated the cause of action as one founded on tort; but the Lord Chief Justice expressed his regret at the anomalous state of the law, by which an option being given to the plaintiff to sue in either form, the right to costs depended merely on the form of the declaration. It is sufficient to say with regard to that case, that the court considered the form of declaration to amount to case and not contract. There was no statement there of any promise or consideration as in this case; but the cause of action was founded wholly on the breach of duty. The case is therefore clearly distinguishable from the present, inasmuch as it proceeds on the precise character of the cause of action as alleged in the declaration, which was wholly different from that in the present case. In the case of Legge *v.* Tucker,[2] where the action was against a livery-stable keeper for negligence in the care of a horse, the court thought that the

[1] 21 L. J. (Q. B.) 273.
[2] 1 H. & N. 500; 26 L. J. (Ex.) 74.

cause of action was founded on contract. This decision preceded that of Tattan *v.* Great Western Ry. Co.,[1] and though it appears to have been cited, the court in delivering their judgment made no observations upon it. Since both those decisions the case of Morgan *v.* Ravey[2] was decided. In that case an innkeeper's executors were sued for the not keeping securely the property of a traveller, and with reference to the difference between their liability in cases of tort and contract, it became necessary to consider whether the action was founded on tort or contract, and it was considered that it was founded on contract, and the executors were therefore held liable. Mr. Bullen, in his excellent work on Pleading, 3d ed., p. 121, states that the question of costs depends on the substance of the thing, not on mere matter of form. Pollock, C. B., says, in delivering the considered judgment of the court in Morgan *v.* Ravey:[3] "We think that the cases have established that where a relation exists between two parties which involves the performance of certain duties by one of them and the payment of reward to him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him." Looking to those authorities, if it were now necessary to consider the case of Tattan *v.* Great Western Ry. Co.,[1] and to decide upon what seems to amount to a conflict of authority, I should be disposed to adopt the decisions of the Court of Exchequer and the principles on which they are based, but it is not necessary to do so in this case, inasmuch as it is distinguishable from Tattan *v.* Great Western Ry. Co.[1] on the form of the declaration.

Keating, J. I am of the same opinion. I do not pronounce any opinion on the question whether the decision in Tattan *v.* Great Western Ry. Co.[1] is right or not, for I think that case is distinguishable from the present. There the declaration was against a common carrier on the custom of the realm; here a promise is alleged and a breach of such promise. It seems to me that the cause of action here is plainly founded on a contract within the meaning of the section.

Honyman, J. I am of the same opinion. There are many actions against carriers and other parties in which the declaration may be framed either in tort or contract. The distinction between the two was very material in former days. The rule is thus laid down by Tindal, C. J., in Boorman *v.* Brown:[4] "That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach or non-performance is indifferently either *assumpsit* or case upon tort, is not disputed; such as actions against attorneys, surgeons, and other professional men, for want of proper

[1] 2 E. & E. 844; 29 L. J. (Q. B.) 184.
[2] 6 H. & N. 265; 30 L. J. (Ex.) 131.
[3] 6 H. & N., at p. 276.
[4] 3 Q. B. 516.

skill or proper care in the service they undertake to render; actions against common carriers, against shipowners, on bills of lading, against bailees of different descriptions, and numerous other instances occur in which the action is brought in tort or in contract at the election of the plaintiff." The decisions on the right to costs in such cases do not appear to be very easily reconcilable. It does not seem altogether satisfactory that the plaintiff should by declaring in one particular form rather than another alter the liability of the defendant in respect of costs, but many of the authorities seem to show that he may do so. In this case, however, the form of the declaration in my opinion is clearly that of a declaration in contract. The duty alleged is alleged as proceeding from the contract between the parties. The plaintiff having chosen so to frame the cause of action cannot now, it appears to me, turn round and say that for the purposes of costs the cause of action is based on tort. As regards the decision in Tattan *v.* Great Western Ry. Co.[1] and the other decisions that have been referred to, I pronounce no opinion as to which we ought to follow if it were necessary to decide between them. It is clear on consideration of the former case that the declaration there was a declaration on the case, and the present case is therefore distinguishable.

Rule refused.

POZZI *v.* SHIPTON.

Queen's Bench. 8 A. & E. 963. 1838.

Case. The declaration stated that, on, etc., the plaintiff caused to be delivered to the defendants, and the defendants then accepted and received of and from the plaintiff, a certain package containing a looking-glass of the plaintiff, of great value, to wit, etc., to be taken care of, and carried and conveyed by the defendants from Liverpool to Birmingham in the county of Warwick, and there, to wit, at Birmingham, to be delivered to one Peter Pensey for the plaintiff, for certain reasonable reward to the defendants in that behalf; and thereupon it then became and was the duty of the defendants to take due care of the said package and its contents whilst they so had the charge thereof for the purpose aforesaid, and to take due and reasonable care in and about the conveyance and delivery thereof as aforesaid; yet the defendants, not regarding their duty in that behalf, but contriving and fraudulently intending to deceive and injure the plaintiff in that behalf, did not nor would take due care of the said package and its contents aforesaid, whilst they had the charge thereof for the purpose aforesaid, or take due and reasonable care

[1] 2 E. & B. 844; 22 L. J. (Q. B.) 184.

in and about the conveyance and delivery thereof as aforesaid; but on the contrary thereof, the defendants, whilst they had the charge of the said package and its contents for the purpose aforesaid, to wit, on, etc., took so little and such bad and improper care of the said package and its contents, and such bad and unreasonable care in and about the conveyance and delivery thereof as aforesaid, and so carelessly and negligently conducted themselves in the premises, that the said looking-glass, being of the value aforesaid, afterwards, to wit, on, etc., became and was broken and greatly damaged. To the damage of the plaintiff of £10, etc.

Pleas: 1. Not guilty. 2. That plaintiff did not cause to be delivered to defendants, nor did defendants accept from plaintiff, the said package, etc., to be taken care of and carried, etc., and safely to be delivered, etc., for reward in that behalf, in manner and form, etc. Conclusion to the country. Joinder.

[Verdict for plaintiff and a rule *nisi.*]

Patteson, J. This is an action against carriers for negligence. A verdict was found for the plaintiff against one of the defendants only, and, upon a rule for a new trial having been obtained, the case was argued in last Easter Term before my brothers, Littledale, Coleridge, and myself.

The form of the declaration is in case, and differs from that used in Bretherton *v.* Wood [3 Brod. B. 54], in this, that it contains no positive averment that the defendants were carriers; whereas in Bretherton *v.* Wood there was an averment that the defendants were proprietors of a stagecoach, for the carriage and conveyance of passengers for hire from Bury to Bolton. The present declaration states simply that the plaintiff delivered to the defendants, and the defendants received from the plaintiff, goods to be carried for hire from A to B. It is therefore consistent with the defendants being common carriers, or being hired on the particular occasion only. Upon the trial it was proved satisfactorily that the defendant against whom the verdict was found was a common carrier; and it does not appear to have been objected, at that time, that proof of an express contract between the plaintiff and the defendants was necessary in order to sustain the declaration. If such proof was not necessary, it can only be because the declaration may be read as founded on the general custom of the realm; and, if it *may* be so read, the court after verdict *must* so read it; and then the case of Bretherton *v.* Wood is directly in point in favor of the plaintiff.

Upon consideration we are of opinion that the declaration may be so read. The practice appears to have been in former times to set out the custom of the realm; but it was afterwards very properly held to be unnecessary so to do, because the custom of the realm is the law, and the court will take notice of it, and the distinction has for many years prevailed between general and special customs in this respect. Afterwards the practice appears to have been to state

the defendants to be *common carriers for hire, totidem verbis*. That, however, was departed from in Bretherton *v.* Wood to a considerable extent, and certainly still farther upon the present occasion.

It may be that the present declaration could not have been supported on special demurrer for want of some such averment; but on this point we are not called upon to give any opinion. It does not state that the goods were delivered to the defendants at their special instance and request, nor contain any other allegation necessary applicable to any express contract only, or even pointing to any express contract. We cannot, therefore, say that it shows the action to be founded on contract; and it is sufficient for the present purpose, if the language in which it is couched is consistent with its being founded on the general custom as to carriers.

Taking this declaration, therefore, to charge the defendants as common carriers, it follows that it is strictly an action on the case for a tort, and that one of several defendants may be found guilty upon it according to the doctrine established in Bretherton *v.* Wood. The evidence warrants the verdict which has been found, and *we* cannot disturb that verdict. We purposely abstain from giving any opinion whether the doctrine in Govett *v.* Radnidge [3 East, 62] or that in Powell *v.* Layton, 2 N. R. 365, be the true doctrine, as we do not feel ourselves called upon to decide between them, supposing them to differ.

The rule must be discharged.

Rule discharged.

SMITH *v.* SEWARD.

3 Penn. St. 342. 1846.

This was an action on the case for the loss of horses, etc., in crossing a ferry. The plaintiff declared against A. Smith, as owner and occupier, and E. Smith being in his employ for conducting said ferry: "for that they, the said defendants, respectively occupying and conducting said ferry, offered and undertook, in consideration that the public, and those desirous of travelling across said river, should be conveyed across by means of the ferriage of said defendants, and for hire to receive and safely to convey across said river, by a certain ferryboat, across, etc.; and also all wagons, etc.; and, having thus offered and undertaken, did use, occupy, and conduct said ferry; that plaintiff learning said defendants did so use and occupy, and had offered and undertaken safely to transport, etc.," brought certain horses, and a wagon of the value, etc., together with goods in the case of L. O. to said ferry. That said horses, etc., being on said track, E. Smith, at the instance, and in the employ of

A. Smith, did agree safely to receive and convey, and that plaintiff, in consideration of such undertaking, committed said property to the care of said defendants. That defendants contriving, etc., did not safely convey, but through their carelessness said goods, etc., were thrown into the river and lost.

The second count was in substance the same, laying a general undertaking by defendants to convey. The plea was not guilty. The evidence showed, according to the finding of the jury, though there was conflicting testimony whether the negligence of the wagoner was the cause of the accident, that there was no fall-board at the end of the flat used as a ferryboat, and it being insecurely fastened to the shore, the wheels of the wagon striking the side of the boat, as it was being driven on board under the direction of the ferryman, the flat was shoved from the shore, and the horses fell into the river and were drowned, the harness injured, and a whip and robe lost.

One of the witnesses called by plaintiff to prove these facts, before any evidence of negligence was given, was the owner of the goods in the wagon, which were also injured; he had hired the horses of the plaintiff, and a wagoner to haul them; to his deposition an exception was taken.

His Honor (Conyngham, P. J.) instructed the jury that the action being for a tort, viz., negligence of defendants, a recovery could be had against either of the defendants if the evidence justified it, the owner of the ferry being bound to have the boat and fixtures in proper order; but as the only ground was defect in the fastenings, he did not see how a verdict could be found against the hired man. That a ferryman was a common carrier, and was responsible for all losses except those occasioned by the act of God, inevitable accident, or the public enemies. If a fastening was necessary, he was bound to have it, and if it broke he was liable though he thought it sufficient.

To this there was an exception, and the errors assigned were to the admission of the testimony excepted to. 2d. In the construction that a verdict could pass against one defendant. 4th. The charge as to the extent of the liability. The 3d was for not arresting the judgment. The reasons in support of the motion were, 1. The declaration sounded in contract, and there being a verdict in favor of one defendant, no judgment could be entered. 2. That no sufficient consideration was alleged.

Butler and *Wright*, for plaintiffs in error. The declaration is in *assumpsit*, and the undertaking and agreement of the defendant are alleged as the *gravamen* of the action; hence, of course, both or neither defendants are liable. That this is so, is shown from the fact that no single requisite to a declaration in contract is wanting. . . .

Dana, *contra*. The occupation of defendant implied a general undertaking and obligation to keep suitable boats and fastenings.

the failure in which is a tort or violation of his duty, by reason that it is a breach of his undertaking; and it was long doubted whether a verdict could pass for *one only* in a suit against carriers. Here the misfeasance was distinctly put in issue and canvassed in the court below; and there must be a clear violation of some rule of pleading to reverse a judgment under such circumstances. All actions against carriers are directly on the contract or for a tort founded in fact on, or deducible from a contract, for wanton injuries rarely occur; a declaration must therefore be tinctured with contract. Church *v.* Mumford, 11 Johns. 479; Zell *v.* Arnold, 2 Penna. Rep. 292. But the plea cures all defects, provided there be a tort averred in the declaration; Bac. Abr. 3, Pleas G. 2; and the averment of a consideration became immaterial.

2. The evidence does not show that he was such a bailee as to be liable in the manner now contended for, and if he was, that is waived by this action.

GIBSON, C. J. . . . . .

The motion to arrest the judgment for the reason that the verdict was against but one of the defendants, was properly dismissed, the declaration being for a tort, which is both joint and several. It was originally the practice to declare against a carrier only on the custom of the realm; but it has long been established that the plaintiff may declare in case or *assumpsit* at his election; and it is usual to declare in the latter, as was done in McCahan *v.* Hurst, 7 Watts, 175, Todd *v.* Figley, id. 524, and Hunt *v.* Wynn, 6 Watts, 47. Indeed, his right to do so seems never to have been questioned by the English courts. On the contrary, the judges in Powell *v.* Layton, 2 N. R. 356, and Dale *v.* Hall, 1 Wils. 282, thought that the declaration is essentially founded in contract, though the word *suscepit* be not in it. In Powell *v.* Layton, the defendant was allowed to plead the non-joinder of his partner in abatement, though the word *duty* stood in place of the word *promise;* in which the court seems to have gone very far, inasmuch as the plaintiff may certainly waive the contract and go for a tort. There has been a good deal of wavering on the subject, not only as to the proper remedy, but as to the distinctive feature of the declaration. In regard to the latter, Corbett *v.* Packington, 6 Barn. & Cres. 268, has put the law of the subject on satisfactory ground, by making the presence or absence of an averment, not of promise only, but of consideration also, the criterion; for it is impossible to conceive of a promise without consideration, any more than a consideration without promise, as an available cause of action; and when a consideration is not laid, the word *agreed*, or *undertook*, or even the more formal word, *promised*, must be treated as no more than inducement to the duty imposed by the common law. Now no consideration is laid in the count before us. The undertaking of the defendants to safely pass the team, is stated to be the consideration which moved

the wagoner to commit it to their care; but no consideration is stated for anything else: certainly, none for the defendant's undertaking. As the declaration, therefore, is decisively in case, the verdict against one of the defendants and for the other is consequently good.

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Judgment affirmed.

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c. *Burden of Proof.*

TRANSPORTATION CO. *v.* DOWNER.

11 Wall. (U. S.) 129. 1870.

Error to the Circuit Court of the United States for the Northern District of Illinois.

This case was an action against the Western Transportation Company to recover damages sustained by the plaintiff from the loss of eighty-four bags of coffee belonging to him which the company had undertaken to transport from New York to Chicago. The company was a common carrier, and, in the course of the transportation, had shipped the coffee on board of the propeller "Buffalo," one of its steamers on the lakes. The testimony showed that the steamer was seaworthy, and properly equipped, and was under the command of a competent and experienced master; but on entering the harbor of Chicago in the evening, she touched the bottom, and not answering her helm, got aground, and during the night which followed, kept pounding, and thus caused the hold to fill with water. The result was, that the coffee on board was so damaged as to be worthless.

The bill of lading given to the plaintiff by the transportation company at New York exempted the company from liability for losses on goods insured and losses occasioned by the "dangers of navigation on the lakes and rivers." The defence made in the case was, that the loss of the coffee came within this last exception.

Upon the trial the plaintiff having shown that the defendant had the coffee for transportation, and that the same was lost, the defendant then showed by competent evidence that the loss was occasioned in manner above stated, — that is, by one of the "dangers of lake navigation." The plaintiff then endeavored to prove that this danger and the consequent loss might have been avoided by the exercise of proper care and skill. The defendant moved the court to instruct the jury as follows: —

"If the jury believed from the evidence that the loss of the coffee in controversy was within one of the exceptions contained in the bill

of lading offered in evidence, that is to say, if it was occasioned by perils of navigation of the lakes and rivers, then the burden of showing that this loss might have been avoided by the exercise of proper care and skill is upon the plaintiff; then it is for him to show that the loss was the result of negligence."

The court refused to give this instruction and the defendant excepted, and at the request of the plaintiff, gave instead the following, to the giving of which the defendant also excepted, viz. : —

"The bill of lading in this case excepts the defendant from liability, when the property is *not* insured, from perils of navigation. It is incumbent on the defendant to bring itself within the exception, and it is the duty of the defendant to show that it has not been guilty of negligence."

The plaintiff recovered, and the defendant brought the case here on writ of error.

Mr. Justice Field. On the trial the plaintiff made out a *prima facie* case by producing the bill of lading, showing the receipt of the coffee by the company at New York, and the contract for its transportation to Chicago, and by proving the arrival of the coffee at the latter place in the propeller "Brooklyn" in a ruined condition, and the consequent damages sustained. The company met this *prima facie* case by showing that the loss was occasioned by one of the dangers of lake navigation. These terms, "dangers of lake navigation," include all the ordinary perils which attend navigation on the lakes, and among others, that which arises from shallowness of the waters at the entrance of harbors formed from them. The plaintiff then introduced testimony to show that this danger, and the consequent loss, might have been avoided by the exercise of proper care and skill on the part of the defendant. If the danger might have been thus avoided, it is plain that the loss should be attributed to the negligence and inattention of the company, and it should be held liable, notwithstanding the exception in the bill of lading. The burden of establishing such negligence and inattention rested with the plaintiff, but the court refused an instruction to the jury to that effect, prayed by the defendant, and instructed them that it was the duty of the defendant to show that it had not been guilty of negligence. In this respect the court erred.[1] In Clark *v.* Barnwell,[2]

[1] The plaintiff further contends, "that when a risk, for which a common carrier may be liable, is limited by a special contract, the burden of proof rests upon the carrier to show not only that the cause of the loss was within the terms of the limitation, but also upon its own part that there was no negligence." In this we do not agree with him. It is well settled that when the liability of the common carrier is limited by a special contract, the carrier is only liable for losses and damages caused by his own negligence, and the burden of proving the negligence is on the party who alleges it. Steamboat Emily *v.* Comey, 5 Kas. 645; Mo. Pac. Rly. Co. *v.* Haley, 25 Id. 35; Thomas on Railroads on Negligence, § 12; Whitworth *v.* Erie Rly. Co., 87 N. Y. 413. Per Horton, J., in Kan. *ex rel.* *v.* Atchison, &c. R. Co., 32 Kan. 263.

[2] 19 Howard, 272.

the precise point was involved, and the decision of the court in that case is decisive of the question in this. And that decision rests on principle. A peril of navigation having been shown to exist, and to have occasioned the loss which is the subject of complaint, the defendant was *prima facie* relieved from liability, for the loss was thus brought within the exceptions of the bill of lading. There was no presumption, from the simple fact of a loss occurring in this way, that there was any negligence on the part of the company. A presumption of negligence from the simple occurrence of an accident seldom arises, except where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible. Thus, in Scott *v.* The London and St. Catharine Dock Company,[1] the plaintiff was injured by bags of sugar falling from a crane in which they were lowered to the ground from a warehouse by the defendant, and the court said, "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

So in Curtis *v.* The Rochester and Syracuse Railroad Company,[2] the Court of Appeals of New York held that the mere fact that a passenger on a railroad car was injured by the train running off a switch was not of itself, without proof of the circumstances under which the accident occurred, presumptive evidence of negligence on the part of the company. The court said that carriers of passengers were not insurers, and that many injuries might occur to those they transported for which they were not responsible; but as railroad companies were bound to keep their roads, carriages, and all apparatus employed in working them, free from any defect which the utmost knowledge, skill, and vigilance could discover or prevent, if it appeared that an accident was caused by any deficiency in the road itself, the cars, or any portion of the apparatus belonging to the company and used in connection with its business, a presumption of negligence on the part of those whose duty it was to see that everything was in order immediately arose, it being extremely unlikely that any defect should exist of so hidden a nature that no degree of skill or care could have seen or discovered it.

It is plain that the grounds stated in these cases, upon which a presumption of negligence arises when an accident has occurred, have no application to the case at bar. The grounding of the propeller and the consequent loss of the coffee may have been consistent

[1] 3 Hurlstone & Coltman, 596. [2] 18 New York, 543.

with the highest care and skill of the master, or it may have resulted from his negligence and inattention. The accident itself, irrespective of the circumstances, furnished no ground for any presumption one way or the other. If, therefore, the establishment of the negligence of the defendant was material to the recovery, the burden of proof rested upon the plaintiff.

For the error in the refusal of the instruction prayed, and in the instruction given, the judgment must be reversed, and the cause remanded for a new trial.

SHRIVER *v.* SIOUX CITY & ST. PAUL R. CO.

24 Minn. 506. 1878.

Appeal by defendant from a judgment of the District Court for Nobles County.

Gilfillan, C. J. At Tiffin, Ohio, the plaintiff shipped with the Baltimore & Ohio Railroad Company two marble slabs, packed in a close box, consigned to herself at Worthington, in this State, and upon the requirement of the company executed an agreement releasing the company, and each and every other company over whose line the goods might pass to their destination, from any and all damages that might arise from certain specified causes, and "from any cause not arising from gross negligence of the said company or companies, its or their officers or agents." The slabs passed to their destination over the Baltimore & Ohio, and two other railroads, to St. James, in this State, and over the road of the defendant from St. James to Worthington, and when delivered by the defendant to the plaintiff, at Worthington, were found to have been broken. This action was brought to recover damages for the injury.

At the trial an objection was made to a question to a witness accustomed to packing marbles for transportation, calling for his opinion upon whether these marbles were properly packed. It was a case for expert testimony, and the objection was properly overruled.

The court charged the jury, in substance, that common carriers of goods cannot, by contract, absolve themselves from the consequences of their own negligence, and that, the contract proved, could not be allowed to have that operation; that the burden of proof to show ordinary care was on the defendant, and that the jury might presume negligence from the fact that the goods were found to be damaged when delivered to plaintiff at Worthington.

Defendant excepted to these propositions in the charge, and requested an instruction that the contract was reasonable, and that the plaintiff could not recover without gross negligence of the defendant,

which the court declined. Defendant also requested an instruction that if the marble was so improperly packed by the plaintiff that it could not be handled with reasonable care in the transportation without injury thereto, the plaintiff cannot recover. The court gave this instruction with the qualification, "unless the injury happened independent of the defects in the packing." To this defendant excepted. The qualification was correct, for while plaintiff could not recover for an injury to which her negligence contributed, no negligence of hers unconnected with the cause of the injury could defeat a recovery.

The charge presents the question of the power of a common carrier of goods to limit by contract his liability as it existed at common law. It is, perhaps, to be regretted that courts have allowed any relaxation of the common-law rule of liability. But that a common carrier may by special agreement qualify to some extent his liability is too well settled by decisions to be denied. How far he may do it the authorities are not entirely agreed. The greater number of authorities in the United States hold, and, since Christenson *v.* American Express Co., 15 Minn. 270, it is to be taken as the settled doctrine of this court, that a common carrier of goods shall not be permitted to exonerate himself by contract from liability for his own negligence, or the negligence of the agents whom he employs to perform the transportation. The contract in question seeks to exonerate the carrier from liability for all except gross negligence, and is obnoxious to the rule. The charge of the court upon it, and upon the rule, was correct.

When there is a contract limiting the liability to injuries caused by the negligence of the carrier, which party, the owner or the carrier, must show from what cause the injury or loss arose, is a question upon which there is some conflict of authorities. Harris *v.* Packwood, 3 Taunt. 264 [**164**]; Marsh *v.* Horne, 5 B. & C. 322; French *v.* Buffalo, N. Y. & E. R. Co., 43 N. Y. 108; Sager *v.* S. & P. & E. R. Co., 31 Me. 228, and Kallman *v.* United States Express Co., 3 Kan. 205, affirm the rule, without giving any reason for it, to be that the burden is on the owner. On the other hand, in 2 Greenl. Ev. § 219, the rule is stated, "and if the acceptance of the goods were special, the burden of proof is still on the carrier to show not only that the cause of the loss was within the terms of the exception, but also that there was on his part no negligence or want of due care." And this rule is followed in Swindler *v.* Hillard, 2 Rich. (S. C.) 286; Baker *v.* Brinson, 9 Rich. 201; Davidson *v.* Graham, 2 Ohio St. 131; Graham *v.* Davis, 4 Ohio St. 362; and Whitesides *v.* Russell, 8 W. & S. 44. The latter cases are most consistent with principle; for, where there is no contract, there has never, so far as we know, been any question that the carrier, to escape liability, must show the case to have occurred from one of the causes which the law excepts from his liability. No good reason can be given why

the burden should be changed because he has by contract added other exceptions to those made by the law. As to where the burden of proof was, the charge was correct.

There was some evidence from which the jury might find that when delivered to the B. & O. R. Co., the slabs were in good condition. Between that company and the defendant there were two intermediate carriers. There was no direct evidence showing upon what part of the line, composed of the four railroads, or in the hands of which of the four carriers, the slabs were broken; and there was nothing to charge the breaking upon the defendant, unless the jury might presume that the slabs continued, until they came into the hands of defendant, in the same condition as when delivered to the B. & O. R. Co. That, where goods pass over a line of several different carriers, the jury, there being no direct evidence to the contrary, may presume that they reached the last carrier in the same condition as when delivered to the first, as discussed at length, and affirmed, in Smith *v.* The New York Central R. Co., 43 Barb. 225, and Laughlin *v.* The Chicago & Northwestern R. Co., 28 Wis. 204, — the only cases we find in which the point is considered. Although the question is not free from doubt, we think the conclusion reached by the courts in these two cases correct. It is a rule of evidence that things once proved to have existed in a particular state are presumed to have continued in that state until the contrary is shown; but it is not a rule of universal application. The probabilities in a particular case may prevent its application. The courts in New York and Wisconsin, there being nothing in the case to render the presumption improbable, apply it to a case like this, mainly because the carrier may ordinarily know, while ordinarily the owner cannot know, what happens to the goods, and what care is taken of them in their passage, and if they are lost or injured, when and how it occurred, and in what condition they came from the hands of a prior carrier into his. It is in part because of his superior ability to furnish the proof that the *onus* of showing the cause of a loss or injury to be within the exceptions to his liability is imposed on the carrier. For the same reason we think that ordinarily a subsequent carrier should be required to show in what condition goods came into his hands, or that their condition did not change while they were in keeping. The rule may seem hard, and so may seem the rule regulating the liability of the carrier, and fixing the burden of proof on him; but public policy, and the due protection of owners, require that common carriers should be held to a severe liability.

Judgment affirmed.

MARQUETTE, HOUGHTON & ONTONAGON R. CO. *v.* P. KIRKWOOD.

45 Mich. 51. 1880.

CASE. Defendants bring error. Reversed.

CAMPBELL, J. Defendants in error sued plaintiffs in error and recovered damages for breakage of two marble soda fountains, taken by the railroad agents at Marquette and carried, one to Negaunee, and one to Ishpeming. The fountains were packed in New York and forwarded by the New York Central Railroad, and by that company, as is claimed, turned over at Buffalo to the Lake Superior Transit Company, which is a connecting line. The Transit Company delivered the property at Marquette to the plaintiff in error, with which it had no business arrangements, but which was the proper carrier from Marquette to the destination of the articles. The boxes which were marked to be handled with care were then apparently sound, except that a handle of one, consisting of a strip of board, was injured. Each box, when opened at its destination, was found to contain a fountain of which some of the marble was broken.

The testimony for plaintiffs, as well as that for defendants, indicates that there was no appearance in either package which would indicate damages at any time, except the broken handle. There was no evidence of neglect on the part of the railroad company, and there was affirmative evidence to the contrary. It was conceded that the railroad company had no means of inspecting the property. Under these circumstances the Circuit Court told the jury that if the goods were delivered in New York in good order to the first carrier, they would have a right to infer that they continued so when received by defendants below, unless evidence was given which showed the contrary. The court also told the jury that if they found it necessary to consider the testimony given by the agents and employees of the railroad, they should bear in mind the interest they have in protecting their company and shielding themselves from blame. In doing this a very similar statement was made concerning the testimony of the packers in New York.

While there may appear on the trial on direct or cross-examination such bias or behavior as would authorize comment by counsel to the jury, we think it is not within the province of a court to instruct a jury, or suggest to them, that any suspicion attaches to the testimony of agents or servants of a corporation or individual by reason of their employment, or that they have any such interest as requires them to be dealt with differently from other witnesses. Even inter-

cised witnesses are now let in by statute, and the policy pointed out by the statute indicates that the old presumption that interest will necessarily or probably lead to falsehood, was unjust and untrue. But none of these witnesses could have been excluded under the most rigid common-law rules; and whatever license of criticism may be allowed to counsel, it was not, we think, legally justifiable to invite the jury to look upon such testimony with disfavor. There is no legal presumption against it.

Upon the other question we think that the ruling was also wrong. The case comes directly within the principle laid down by this court in M., H. & O. R. R. *v.* Langton, 32 Mich. 251, where it was sought to hold these same parties responsible for delivering hay in a damaged condition, by showing that it was in good condition when delivered to a previous carrier at Sheboygan. In that case, as in this, the court below held that such a showing shifted the burden of proof upon the railroad company, and he held that this was error, and that the plaintiff was bound to show affirmatively that the hay was delivered in good order at Marquette to the railroad.

We think this rule is just, and are not at all disposed to depart from it. A carrier has no means in a case like this of opening packages and examining their contents. Unless there is some outward token which is suspicious, he may and must take the articles and forward them on the usual terms. He is bound in law to deliver them in the condition in which he receives them. But there can be no further responsibility; and any rule of law which would make him responsible actually or presumptively for the conduct of previous independent carriers, would be grossly unfair, and subject him to losses against which he could have no protection. He has nothing to do with any of the previous dealings with the property, and no means of informing himself about them. We cannot see how this case is different from what it would have been if the plaintiffs themselves had delivered the boxes to the company at Marquette. In law the Transit Company acted merely as plaintiffs' agent in turning them over, and cannot be treated as representing the Marquette Railroad Company for any purpose without reversing the whole order of business. Fitch *v.* Newberry, 1 Doug. (Mich.) 1.

In view of our previous decision we should not feel justified in going into this question at all, if it did not seem to be imagined that if the case of Laughlin *v.* Railway, 28 Wis. 204, had been fully called to our attention it might have changed our views. The other cases cited on the argument, except one from North Carolina following it, do not have any particular bearing. In that case the court, treating it as a question not directly covered by previous precedents, held that it would be more convenient and less onerous to the owners of goods to adopt such a rule as is contended for by the plaintiffs below. The only ground discovered for it was the presumption that things remain as they once have been shown to exist. The case

cited as resting on that presumption were not at all in point except by some assumed analogy.

We certainly have the highest respect for the decisions of the court which so decided. But we cannot convince ourselves that the decision is well founded on legal analogies, or correct in principle.

The presumption that things remain unchanged applies in such a case as the present just as forcibly backward as forward. It may quite as reasonably be presumed that the goods were delivered at Negaunee and Ishpeming in the condition in which they were received at Marquette, as that they came to Marquette as they left New York. The goods were certainly damaged when they reached their destination. To assume that they were damaged after they left Marquette, and not on any of their previous removals, is to make a very arbitrary assumption which has no more foundation in probability than any other. If it were worth while to enlarge on what is confessedly a presumption not resting on any sure foundation in experience, it might very well be questioned whether such a presumption is admissible at all as applied to things the position of which does not remain either fixed in place or free from disturbance by human agencies. But we need not enlarge on this because the nature of the suit itself raises different presumptions which are well recognized.

This suit is based on the negligence of the carrier. It can only be maintained on the theory that the carrier or its servants did not properly care for or handle the goods. There is no rule better established or more righteous than the rule that any one who claims a right to damages for negligence must prove it. The presumption that a party sued has done no wrong must prevail till wrong is shown. A carrier's obligation to carry safely what he received safely is independent of care or negligence. But in the absence of proof that there was property delivered to him, or safely delivered to him, any presumption that he received it is one which goes beyond and behind the duty of a carrier and enters into the origin and making of the contract. Until such property comes into his hands there is nothing for a contract to act upon, and the contract is not proved until that is proved.

In a somewhat similar case, Muddle *v.* Stride, 9 C. & P. 380, Lord Denman told the jury that if it were left in doubt what the cause of damages was, the defendants were entitled to their verdict, "because you are to see clearly that they were guilty of negligence before you can find your verdict against them. If it turns out, in the consideration of the case, that the injury may as well be attributable to the one cause as the other, then also the defendants will not be liable for negligence."

In Gilbert *v.* Dale, 5 Ad. & El. 543, the same rule was laid down, and it was held that there could be no recovery without proof, and that the presumption could not be raised without foundation. And

in Midland Railway *v.* Bromley, 17 Q. B. 372, the same principle was affirmed, and it was held that if the evidence was as consistent with the claim of one side as with that of the other, the plaintiff must fail, because he must make his proof preponderate.

There is no reason for presuming that the Marquette Railroad did the mischief, that would not arise with equal force, according to the Wisconsin decision, against either of the previous carriers had they been sued instead. Had the first carrier been sued, it would unquestionably have been bound to show a safe transit, because that carrier received the articles in actual good order. A presumption that has no better foundation, and that applies to one as readily as to another, ought not to prevail to raise a further presumption of negligence without proof.

The judgment must be reversed with costs and a new trial granted.

MONTGOMERY & EUFAULA R. CO. *v.* CULVER.

75 Ala. 578. 1884.

Clopton, J. . . . The plaintiff, in April, 1883, procured from the Mobile & Girard Railroad Company through tickets for the transportation of himself and members of his family, and through checks for the transportation of his baggage from Columbus, Georgia, to Birmingham, Alabama, over the respective roads of the Mobile & Girard Railroad Company, of the defendant, and of the South and North Alabama Railroad Company, which were connecting lines, the defendant's being the intermediate road. When the baggage reached Union Springs, the place at which the road of defendant connects with the road of the Mobile & Girard Company, it was in good condition; but when it was delivered to the plaintiff at Birmingham, one of the trunks had been broken, and the contents abstracted. On these facts, the court instructed the jury, if the trunk was delivered to and received by the defendant in good order, and when it was delivered to the plaintiff at Birmingham, it was badly broken and its contents taken out, it devolved on the defendants to show that it was delivered in good condition to the South and North Alabama Railroad Company; and if it failed to show this, the plaintiff is entitled to recover. There was no evidence, other than the trunk was in good order at Union Springs, showing when or where it was damaged, or what was its condition when delivered by the defendant at Montgomery to the South and North Alabama Railroad Company. The instruction presents the direct question: Where baggage, for the transportation of which over three connecting roads, operated by separate and independent companies, through checks have been

issued by one of the terminal roads, is found damaged when delivered at the place of destination by the other terminal road, does the burden of proof, in the absence of any special contract or arrangement between the companies, rest on the intermediate road to show not only a delivery to the connecting terminal road, but also that the baggage was in good condition when so delivered, it being shown to have been in good order when received by the intermediate road?

While the transportation of baggage, as such, is incidental to the carriage of the owner as a passenger, and while the railroad companies are only responsible to passengers for injuries sustained from some neglect or wrong, they are liable for the safe delivery of their baggage in the same manner and to the same extent as the carriers of merchandise. 2 Rorer R. R. 991. The question will therefore have to be determined on the same principles as if the baggage had been shipped as freight over the connecting roads. If the defendant were both the receiving and delivering carrier, or liable for the safe delivery of the baggage at the point of destination, proof that it was in good condition when received, and in a damaged condition when delivered, would cast on the defendant the *onus* of showing that the damage was occasioned by some cause, which excepts from the absolute liability of safe delivery.

An arrangement, express or implied, between companies operating several roads, by which either terminal road can issue through tickets and through checks for baggage, each being entitled only to the fare for transporting over its own line, does not render each one liable for the loss or damage sustained on any of the roads. Ellsworth *v.* Tartt, 26 Ala. 733. Such arrangement is not operative to impose on the intermediate carrier the absolute liability of safe delivery. M. & W. P. R. Co. *v.* Moore, 51 Ala. 394. An arrangement, such as the one shown by the evidence, imposed on the defendant the duty to receive from the terminal road, safely carry over its own road, and deliver to the other connecting terminal road. Insurance Co. *v.* Railroad Co., 104 U. S. 146. The receiving terminal road has no power or authority, in the absence of a special contract, to bind the intermediate road to transport beyond its terminus. When the goods have been safely carried to its terminus, its duty as a carrier ceases, and the duty of forwarding arises.

In England, the courts generally have held that the duty and obligation of the carrier, who first receives, continues through the entire route of transportation. In this country there has existed a diversity of opinion. In Railroad Co. *v.* Manufacturing Co., 16 Wall. 318 [**294**], Mr. Justice Davis, while regretting this diversity of opinion as unfortunate for the interests of commerce, says: "But the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction." In Lindley *v.* Railroad Co., 88 N. C. 547, it was held,

that in the absence of explanation as to how or where the loss or damage occurred, or which of the roads on the route is culpable, the receiving carrier must be held responsible for the injury, and that the non-delivery, or delivery in bad condition by the last of the connecting lines, is *prima facie* evidence of default in the receiving carrier. In Mobile & Girard R. Co. *v.* Copeland, 63 Ala. 219, it is said: "It must be regarded as settled, that a carrier, though a corporation, chartered by the laws of a particular State, having a known and defined line of transportation, may contract for the safe carriage and delivery of goods to a point beyond the terminus of his line, within or without the State; and if such a contract is made, all connecting lines stand in the relation of his agents, for whose default he is responsible to the owner of the goods;" and it was held, that in such case it was the known and established duty of the carrier to deliver them at that place, and to the person who has the right to receive them. This rule is conceded, where the contract is for delivery beyond the terminus of the line; but the special agreement in this case was, that the receiving carrier would safely transport the baggage to Union Springs and deliver it in good condition to the defendant, the next connecting road. When this was done, the duty and responsibility of the receiving carrier were at an end. In case of a non-delivery at the point of destination, or a total loss, the liability is *prima facie* on the receiving carrier, and casts on him the *onus* of showing a delivery in good condition to the next connecting road. The expression in S. & N. R. Co. *v.* Wood, 71 Ala. 215, if otherwise understood, are explained and modified as here stated. In case of delivery in bad order by the last carrier, the presumption against the first carrier does not arise.

A different rule applies in the case of the discharging or delivering carrier. From the necessities of trade and commerce, or of successful competition, or from other causes, it has become common to establish long routes of transportation by successive and connecting roads. Under such circumstances it would generally be difficult and oftentimes impossible for the owner to show on which road they were injured. One of the roads is certainly responsible; and the last carrier has the means of showing the condition of the goods when received by him. The safety and protection of the commercial and travelling public require the recognition of the presumption, in the absence of evidence, that the goods continued in the same condition as when received by the first carrier, unless it may be excepted goods of a perishable nature, and casts on the discharging carrier, who delivers them in a damaged condition, the burden of showing their condition when received by him. It has been held in some cases that no such presumption arises, but the rule we approve is ably and elaborately considered and sustained in the following cases: Laughlin *v.* C. & N. Ry. Co., 28 Wis. 204; Smith *v.* N. Y. Cent. R. Co., 43 Barb. 225. This presumption harmonizes with the

spirit, and promotes the policy of the statute, defining the duty and liability of common carriers in respect to the reception of goods for transportation, and their delivery. Code of 1876, § 2139.

No case has been cited to our attention, and we have found none which clearly and expressly determines the rules of presumption in an action against the intermediate carrier. The case of Lindley *v.* R. Co., 88 N. C., *supra*, has been mentioned as sustaining the rule that delivery in bad condition by the last of successive lines is *prima facie* evidence of default in the intermediate line; but an examination of the opinion shows that the defendant, the Richmond & Danville Railroad Company, was managing and operating the road that received the freight, with other connecting roads, under the general name of the Piedmont Air-Line Railway, and was treated and regarded as the first or receiving carrier. There is no question of the liability of an intermediate carrier for a loss or injury occurring on its own road. Chi. & R. I. R. Co. *v.* Fahey, 52 Ill. 81.

Though the intermediate carrier occupies to some extent relations different from those of the first and last carriers, the principles applicable to them, and to carriers in general, will serve to elucidate the question we are considering.

When goods are received by a common carrier for transportation, and are lost or damaged while in custody, the presumption is, that it was occasioned by his default; but the owner must offer some evidence tending to show a non-delivery or delivery in a damaged condition, — in other words, some evidence of the loss or injury while in the custody of the carrier. Proof of the mere reception of goods by a carrier, and of their condition when received, without more, does not create the presumption of loss or damage. S. & N. Ala. R. Co. *v.* Wood, 71 Ala. 215, *supra*. We have said that the duty of the intermediate carrier is to transport safely the goods to his terminus, and deliver in the same condition in which they were received to the next connecting line. A delivery, in such case, to the next connecting line is tantamount to, and must be governed by, the same rules as a delivery to the consignee, where the goods are to be so delivered at the terminus of the line of the intermediate carrier. Had the contract of the defendant been to transport the baggage to Montgomery, the terminus of the road, to be there delivered to the plaintiff, proof of the reception of the baggage, in good order, by the defendant, and a delivery to the plaintiff in apparently like order, though it were subsequently discovered it had been damaged, would not, without more, cast on defendant the burden of showing it was in good condition when delivered. The plaintiff must introduce some evidence of the damaged condition of the goods at the time of delivery. On like principles, when the baggage was delivered by the defendant to, and received by, the next connecting road, proof that it was in a damaged condition when delivered by the last carrier does not operate, in the absence of other evidence, to cast on

the intermediate carrier the *onus* of showing that it was in good condition when delivered to the next connecting road.

We have shown that when goods are received in good condition by the first carrier, to be transported by successive and connecting lines, the presumption is they continue in the same condition until the contrary is made to appear. This presumption is indulged to place a *prima facie* liability on the carrier who delivers the goods in bad order, and who knows their condition when received. To hold that a delivery in bad order by the last carrier raises also the presumption of default in the intermediate carrier will present the anomaly of two inconsistent legal presumptions, — that the same damage was occasioned by the default of the last carrier, and the intermediate carrier while the goods were in their respective custody at different times.

Were there no evidence of a delivery to the next connecting road by the defendant, who had received the baggage, or evidence that it was in bad order when delivered, the *onus* would be on the defendant to show that the loss or injury was occasioned by some cause which exempted from liability. But it appearing from the evidence that the trunk was delivered by the last carrier to the plaintiff, — thereby making manifest a delivery by the defendant to such carrier, if the plaintiff would hold the defendant liable for the damage, he must offer some evidence showing the condition of the trunk at the time of delivery by the defendant.

A presumption should be the natural, usual, and probable inference from the facts proved. A duty having been performed, the presumption of deficient performance will not arise from a subsequent event, no direct relation or connection between such event and the act of performance being shown.

It may be said that this rule will operate to force the owner to successive suits against the different carriers. Any rule of presumption may have the same effect. If the instruction of the Circuit Court were sustained, and the defendant should show the baggage was in good condition when delivered, the plaintiff would be driven to a suit against the last carrier. No rules can be adopted which would avoid such effect, other than to hold each carrier responsible for the damage without respect to the line on which it occurred, which would violate well-settled principles of law. The formation of long routes of transportation by successive roads is in the interest of cheaper transportation and rapid transit; and if shippers adopt this mode of shipping, they accept its difficulties with its benefits. We have endeavored to formulate the rule applicable to each carrier, which best accords with established legal principles. Darling *v.* B. & W. R. Co., 11 Allen, 295.

Reversed and remanded.

d. *Evidence of Negligence.*

EMPIRE TRANSPORTATION CO. *v.* WAMSUTTA OIL REFINING AND MINING CO.

63 Penn. St. 14. 1869.

Error to the Court of Common Pleas of Venango County.

This was an action on the case by the Wamsutta Oil Refining and Mining Company against the Empire Transportation Company, to recover damages for the negligence of the defendants as carriers, by which refined oil of the plaintiffs that the defendants were carrying had been destroyed by fire. The case was tried June 5, 1869, before Trunkey, P. J. The plaintiffs gave evidence that they had shipped 67 barrels of refined oil in the defendants' cars, and that a car of crude oil was loaded for another person at the same time; "the oil was standard light, 110° or upwards." Standard will not ignite by flame at lower than 110°, crude oil will ignite at 65° and below; that 2862 gallons of oil were destroyed.

Wm. Best testified: "I was foreman on the freight train on the 10th of March, 1868. On that morning, about a mile and a half below Wetmore Station, I discovered fire in the front car next to the engine. There was an engine attached to the rear of the train as a pusher. We either cut the front engine from the train first, or the first two cars from the rest of the train. The train was stopped, and then the engineer reversed the rear engine and backed off all but the first two cars. We then tried to separate these two cars. We could not do it, because we could not get the pin out. The pin was fast in some manner, I do not know how. We then broke into the second car and unloaded all the oil we could on account of the heat. The heat was coming in from the front car. The second car caught fire from the first. I do not know how the first car caught. Know of no other cause than sparks from the engine, and I do not know that. I think the train was on schedule time going at its usual speed. The engine was supposed to be in good condition. The fire, when I first discovered it, was at the end next the engine. We had not much time to take the pin out before the flames interfered with us. We were going up a grade. I do not think the brakes were down on the first car. Every effort was made to save the oil after the fire was discovered. We had no difficulty in getting the pin between the second and third cars out."

Geo. O. Downer testified: "Was conductor on this train. The train was going about ten or twelve miles an hour, had been on time all the way. I first discovered that the forward car on the end next the forward engine was on fire. The train was stopped. I tried to

pull the pin between the first and second cars out. It stuck for some reason or other, I do not know what. We then pulled the pin between the second and third cars. The first and second cars were uncoupled. The engine was not throwing any more sparks than usual. The first attempt to cut the train was to separate the first and second cars. The link might have slipped by, and it might be that the links were not slacked; in that case we could not take the pin out. I do not know what was the reason we could not take the pin out. I do not know whether there was any difference in this pin or coupling from other pins and couplings or not. The front engine did emit sparks. I know it took fire from the sparks from the engine."

Wm. H. Burton testified: "I was brakesman on this train. I tried to take the pin out between the first and second cars, but could not do it. I could not get the pin out because the link was jammed. The first or second cars were not coupled as cars are usually coupled. The coupling link could not have got in the shape it did by sudden stopping. It must have got in that shape by going around a curve."

The defendants gave in evidence their receipt to the plaintiffs for the oil, subject to conditions following, the third of which was "that the owner or consignee (in consideration of the extremely hazardous nature of such merchandise, which is not covered by any extra charge for transportation) hereby assumes all risk for leakage, evaporation, and loss by fire, while in transit, or at depots or in stations, or on board boats, vessels, or lighters, from any cause whatever, and all dangers and delays of railroad and water transportation to destination, and in any claim or demand, suit at law or equity, against this company or transportation company, or agent, for loss or damage thereby, this bill of lading shall be deemed and taken as a release in full therefor." They gave evidence also that crude oil and refined oil were usually carried in the same train; that there was not enough refined oil shipped for trains exclusively of that kind. They gave evidence also by the engineer on the train, viz., "the fire caught in rear end of front car. The train was running on time. The engine was in good condition, with new spark arrester. The fire communicated with second car so quick we could not cut it off. It was almost instantaneous."

The second point of the plaintiffs was: "If the jury believe that the defendant placed the car containing plaintiff's refined oil in a train composed in part of cars loaded with crude oil, and the said car containing plaintiff's refined oil was coupled with a car containing crude oil, and the said crude oil was greatly more combustible than the refined oil — and the said crude oil was ignited by sparks from the engine, and communicated the fire to the car containing plaintiff's oil, by which it was destroyed — which sparks would not have ignited the refined oil — and that the coupling of the said refined oil car and the crude oil car in which the fire originated was defective, and that the defendant's servants endeavored to uncouple

the said cars and could and would have uncoupled the said cars and saved the refined oil but for the said defective coupling, the plaintiff is entitled to recover."

This point was affirmed.

The verdict was for the plaintiffs for $678.18. The defendants took a writ of error, and assigned for error the answer to the plaintiffs' point.

Sharswood, J. As a common carrier cannot, by a special notice or limitation in the contract or bill of lading, protect himself from liability for the negligence of himself or his servants, Pennsylvania Railroad Co. *v.* Henderson, 1 P. F. Smith, 315, the only question in this cause was, whether the defendants had been guilty of such negligence. The error assigned is, that the court below took that question from the jury, by affirming the plaintiff's second point, by which they were instructed, that if they were satisfied that certain facts were proved, the plaintiffs were entitled to recover. The rule upon this subject was very clearly laid down in McCully *v.* Clarke, 4 Wright, 399, in which it was said: "There are some cases in which a court can determine that omissions constitute negligence. There are those in which the precise measure of duty is determinate, the same under all circumstances. When a duty is defined, a failure to perform it is, of course, negligence." Other cases fully corroborate this doctrine: Powell *v.* Pennsylvania Railroad Co., 8 Casey, 414; Pennsylvania Railroad Co. *v.* Ozier, 11 id. 60; Pittsburg & Connellsville Railroad Co. *v.* McClurg, 6 P. F. Smith, 294; Glassey *v.* Hestonville Passenger Railway Co., 7 id. 172.

The duty of a common carrier is to provide a vehicle in all respects adapted to the purposes of carriage, and so constructed as to be able to encounter the ordinary risks of transportation. Story on Bailments, § 509. It must be perfect in all its parts, in default of which he becomes responsible for any loss that occurs in consequence of any defect, or to which it may have contributed. Hart *v.* Allen, 2 Watts, 114; New Jersey Railroad Co. *v.* Kennard, 9 Harris, 204. When merchandise, of whatever character, is carried on the same railroad train with cars loaded with a combustible substance, easily ignited by sparks from the locomotive engine, it is the special duty of the carrier to take every available precaution against the communication and spreading of the fire, if it should occur. An evident and simple measure is to have the coupling of the cars in such perfect order that any one or more of them can be easily detached from the others in time to be saved from the consequences. If the fact be that the coupling was defective, unless such defect was the result of an inevitable accident, and, in consequence of it, the car containing the plaintiff's merchandise could not be detached in time to be saved, the negligence and liability of the carrier are inferences of law from the facts.

But it is said that the *onus* in this case was on the plaintiffs below,

to show that the defect of the coupling arose from the negligence or want of care of the defendants. We think not. When the carriage is proved to have been defective at the time of the injury, and that the defect contributed to the loss, the *onus* is then necessarily shifted to the carrier. He must rebut it by evidence that the defect arose, not from the insufficiency of the vehicle into which the goods were loaded, but from some subsequent accident beyond his control. This puts the burden where it ought most properly to rest. The carrier ought to be able to show, with ease, by his servants, that the vehicle was inspected before the commencement of the trip, and everything found to be in good order. It would be very difficult for the plaintiffs to prove the contrary, — that it had not been examined, or that it was in bad order when it started. On the trial of this case, in the court below, there was no evidence to show when or how the links of the coupling of the cars became jammed, so that they could not be separated in time. It was surmised by one of the witnesses, that it must have got into that shape by going around a curve. Even admitting this to be so, the important question remains unanswered, and which it was incumbent on the carriers to answer, when did this occur? Had it been shown to have happened during the course of the same trip in which the fire took place, and that it was not known to, or discovered by, the carriers, or their servants, in time to be remedied, then, indeed, there might have been a question of negligence for the jury. But without any evidence as to this point, there was nothing for them but that which was submitted, whether the coupling of the car was defective, and that defect contributed to produce the loss.

Judgment affirmed.

KIRST *v.* MILWAUKEE, LAKE SHORE & WESTERN R. CO.

46 Wis. 489. 1879.

"The complaint avers a failure on the part of the defendant company to deliver to the consignee three carboys of acid, and alleges that such carboys, through the negligence and default of the agents of the defendant, were broken and discharged. The plaintiffs make a part of their complaint the receipt given by the company on the delivery of the goods in question for transportation, in which receipt it is expressly stipulated that the company shall not be responsible for the breakage of any carboys of acid, unless it can be shown that such damage or loss occurred through the negligence or default of the agents of the company.

"The cause was last tried by the county court, a jury being

waived. It appeared on the trial that the plaintiffs delivered in good condition to the defendant, at its depot in Milwaukee, 28 carboys of acid, to be transported to Appleton. One of the plaintiffs testified that his firm received a letter from the consignees stating that only 25 carboys were received from the carrier at the place of consignment. He says that he then went to the general freight agent, at his office in Milwaukee, to make inquiries about the missing three. He was informed by the agents of the defendant that the three missing carboys had been broken by the Chicago & Northwestern Railway Company in Milwaukee, which company did the switching for the defendant in that city; and that they would examine into the matter and report. After waiting two or three weeks and hearing nothing from the company, the same plaintiff again called upon the agent, and was informed that the matter had been inquired into, and it was found that the three carboys were broken by the Chicago & Northwestern Company while switching, and that, as the latter company refused to pay for the loss, the agent of the defendant refused to pay. The value of the goods was shown, and also the contract for transportation. At the close of the plaintiff's case, the defendant moved for a nonsuit, mainly on the ground that, in addition to proving the loss of the goods the *onus* was upon the plaintiffs, under the stipulation in the receipt, of showing that the breakage occurred through the negligence or default of the agents of the defendant. The learned county court, however, held that, as the defendant had failed or neglected to give a full and fair account as to how the loss occurred, when applied to by the plaintiffs, this was sufficient proof from which negligence on the part of the agents and servants of the company might be inferred. The correctness of this view is the sole question we have to consider."

Plaintiffs had a verdict and judgment; and defendant appealed.

Cole, J. On the part of the defendant it is claimed, that, under the stipulation in the receipt limiting the liability of the carrier, the defendant was simply a bailee for hire of the carboys; and that therefore negligence or default on its part would not be presumed, but must be affirmatively shown by the party charging it, and seeking a recovery founded thereon. The general soundness of this argument may be conceded. But the precise question here is, whether, when the carboys were shown to be in the possession or under the control of the defendant, and a breakage occurred from switching, which, in the ordinary course of things, does not happen if those who have charge of the train use proper care, this does not afford reasonable evidence, in the absence of a full explanation by the carrier, that the loss or breakage did, in fact, occur through the negligence or default of the agents of the company. We are inclined to the opinion that the inference of negligence may be made under such circumstances, and that the ruling of the county court on this point was right. Here the loss resulted from an act from which,

when due care is taken in its performance, loss does not ordinarily ensue. For it is not reasonable to assume that carboys of acid are usually broken, when transported on railroads, by switching of the cars, when that is done in a proper manner. Consequently, when the plaintiffs showed, as they did by the admission of the agents of the company, that the carboys were broken by the Chicago & Northwestern Company while switching, a foundation was laid for a reasonable inference of negligence, especially in the absence of explanation upon the subject, and the burden was thrown upon the defendant to rebut that inference. This was the rule laid down in Scott *v.* London Dock Co., 3 H. & C. 596, on a point quite analogous to the one we are considering. The plaintiff in that case was injured by bags of sugar falling from a crane, in which they were lowered to the ground from the warehouse of the defendant. It was claimed that there was no evidence to go to the jury that the servants of the defendant were guilty of negligence or want of care in lowering the crane. Erle, C. J., in stating the conclusion at which a majority of the court in the Exchequer Chamber had arrived, said: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." In Steers *v.* The Liverpool, N. Y. & P. S. Co., 57 N. Y. 1, "the plaintiff took passage on one of the defendant's steamers for Europe, and received, on payment of the passage-money, a printed ticket signed by the defendant's agent, containing a clause, in substance, that the company was not to be held liable for loss or damage to baggage in any sum, unless the same shall have been proved to have been occasioned by gross negligence of the company or its agents. . . . On going aboard, the plaintiff's trunk was delivered into the custody of the defendant's agents, who assumed to take charge of it; at the end of the voyage, the defendant did not produce it, or in any way account for it. In an action to recover for the loss of the trunk and contents, held, that the evidence was sufficient to sustain a finding by the jury, of gross negligence." The facts in regard to the manner in which the breakage occurred in the present case were more particularly within the knowledge or reach of the defendant, and, according to the doctrine of the above cases, it was called upon to give some explanation of the loss. The agents only said that the carboys had been broken by another company while switching, and gave no other account of their loss. Under these circumstances, we concur in the opinion of the county court, that, because defendant failed or neglected to give a full statement as to how the loss occurred, its negligence might be inferred in that regard.

It follows from these views that the judgment of the county court must be affirmed.

9. CARRIER'S COMPENSATION.

a. *Freight Charges.*

CURLING *v.* LONG.

Common Pleas. 1 Bos. & P. 634. 1797.

Assumpsit for freight claimed under the following circumstances. The plaintiffs were owners of the ship "The Earl of Effingham," and the defendants the consignees of nine hogsheads of sugar shipped on board her while lying in Salt River, Jamaica, and bound for London. The goods were put on board on the 18th of September, 1795, and four several bills of lading were duly signed by the captain. On the 2d of December following, having completed her lading, the ship cleared out for her voyage. On the 31st of December, while waiting for convoy, she was cut out of the river by two French privateers, and carried out to sea, but was recaptured on the same day by a British schooner, and carried into Port Royal. The ship was afterwards libelled in the Admiralty Court of Jamaica, and appraised and sold under an order of that court. The proceeds of the sale, after deducting one-eighth for salvage, were remitted to the defendants as agents for the several owners of goods on board. The whole of the cargo, including the goods in question, was brought to the ship in Salt River for the purpose of being loaded, and was actually put on board at the expense of the plaintiffs as owners of the ship according to the usage of the Jamaica trade. This amounted to £310. The plaintiffs also expended £455 18*s.*, according to the same usage, for the provisions and wages of the crew, between the time when the ship began to take in her loading, and the time of the capture. The plaintiffs' demand was shaped in different ways so as to recover a proportion of the freight either from the 1st of September, 1795, when the goods were put on board, to the 1st of January, 1796, when the ship was recaptured, or from the 2d of December, 1795, the day the goods were shipped, to the 1st of January, 1796, the day she was recaptured; or to recover a proportion of the sums expended by the plaintiffs as above mentioned.

The cause was tried before Eyre, Ch. J., at the Guildhall sittings, after Michaelmas Term, 1796, who directed a nonsuit.

A rule *nisi* for setting aside this nonsuit and entering a verdict for the plaintiffs having been obtained on a former day [etc.].

Eyre, Ch. J. This is a case of the very first impression; and it appears to me that the demand of the plaintiffs is neither warranted by the marine or by the common law. The former has settled what freight is, what services it includes, and also that it is divisible,

which is contrary to the principles of the common law. At common law all the expenses of loading are included in the freight, and if the party be not entitled to freight he can demand no satisfaction for loading. The inception of freight is breaking ground. In the law of insurance, indeed, this doctrine is not holden so strict, for there, if the goods be so situated as to create a well-grounded expectation of freight being raised, it is decided that the freight is insurable and recoverable. But that does not affect the marine law as to freight in cases between the shipowners and freighters, by which the case must be decided. According to that law no right to freight commences till the ship has broken ground; here the ship had not broken ground, having been captured in the river. The situation of the places where cargoes are taken in materially varies the labor, cost, and pains taken by the shipper and master. In some places there is little difficulty and expense, in others a great deal. On those circumstances depends the price of freight: if the master incurs this cost and trouble, he takes a larger freight; if the shipper, a smaller. In either case the freight is his reward. If, therefore, by the marine law he be entitled to no freight, he can claim no remuneration. So stands the case by the marine law. Let us now view it upon the principles of the common law. The contract was to load these goods on board and bring them to England for a certain price. Upon this contract, how could a declaration be framed for the plaintiff's demand either in *assumpsit*, or an action on a charter party? Could the plaintiffs state a part-performance of the contract and insist on payment for it? This could not be done, for by the law of England the contract is entire and indivisible. By the marine law, indeed, parties may recover *pro rata*, if the voyage be interrupted. And by the common law, where a contract *cannot* be performed, such a meritorious consideration may arise as will sometimes entitle a party to recover in the form of an action of *assumpsit* for work and labor even after the contract has been broken. Such is the case where a ship after capture and recapture completes her voyage; for there the shipper has his goods with the advantage of carriage; and upon that, though the original contract be gone, a meritorious consideration arises which entitles the master to a recompense; not, however, on the foot of the old contract, but on a new contract which springs out of it. Here the ship never arrived at the port of destination, but put into a port in Jamaica, without having conferred any benefit on the freighters by the carriage, or bettered the goods in the smallest degree by the expenses incurred. I am therefore of opinion, that neither by the marine or the common law are these plaintiffs, however unfortunate, entitled to recover.

Heath, J. This is a demand for a proportion of freight. The contract for freight is technical in its nature. By the marine law an inchoate right to freight attaches from the ship's breaking ground, and is consummated upon her arrival at the port of destination. If

the voyage be interrupted the party may claim *pro rata*. Freight commences at the same time in all parts, since it depends on the same principles here and at Jamaica. It is true, indeed, that by the customs of different ports, duties more or less onerous may be imposed on the master, and recompensed by the freight. But that does not vary the principle. This case is only new in its circumstances. The law of insurance does not apply to this case; for the mere hope or expectation of interest is sufficient to entitle the assured in a policy of insurance to recover against the underwriters.

Rooke, J. This is a new case, and therefore I take the demand not to be founded on the usage of trade. The contract in a bill of lading is for freight. The expression is, "they paying freight;" and though the master may have been at the expense of loading, and the freight was higher on that account, yet as it had not commenced, the plaintiffs cannot demand a recompense. The text-writers all agree that freight commences from the breaking ground. This is clear and intelligible: the ship begins to earn when she begins to move; and we cannot introduce new principles. The writers also say, that there may be cases where the shipowners may be entitled to a proportion of what the ship has earned; but that cannot include what has been earned by the master before the commencement of the voyage. This doctrine is founded in good policy, for it tends to expedite the sailing of the ship. Did the freight commence sooner, it might induce the master to stay a longer time in port and so delay the voyage. Insurance is a contract of indemnity; the cases, therefore, which are founded on such a contract are not applicable to this case. Upon these grounds I think the nonsuit right.

Rule discharged.

TINDAL *v.* TAYLOR.

Queen's Bench. 4 El. & B. 219. 1854.

Lord Campbell, C. J. We entirely agree to the law laid down by Lord Tenterden in his treatise (8th ed.), p. 595, and in Thomson *v.* Trail, 2 Car. & P. 334, E. C. L. R. vol. 12, when applied to a general ship, that "a merchant, who has laden goods, cannot insist on having them relanded and delivered to him without paying the freight that might become due for the carriage of them, and indemnifying the master against the consequences of any bill of lading signed by him." It is argued that there can be no lien on the goods for freight not yet earned or due; but when the goods were laden to be carried on a particular voyage, there was a contract that the master should carry them in the ship upon that voyage for freight; and the general rule is that a contract once made cannot be

dissolved except with the consent of both the contracting parties. By the usage of trade, the merchant, if he redemands the goods in a reasonable time before the ship sails, is entitled to have them delivered back to him, on paying the freight that might become due for the carriage of them, and on indemnifying the master against the consequences of any bills of lading signed for them: but these are conditions to be performed before the original contract can be affected by the demand of the goods. It would be most unjust to the owners and master of the ship if we were to hold that upon a simple demand at any time the goods must be delivered back in the port of outfit; and Thompson *v.* Small, 1 Com. B. 328, the case relied upon by Mr. *Willes*, is no authority for such a doctrine.

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BAILEY *v.* DAMON.

3 Gray (Mass.) 92. 1854.

Assumpsit on a contract in writing, dated the 7th of February, 1850, whereby the defendants agreed to ship, and the plaintiffs to transport, seventy-five thousand feet of lumber from Boston to Sacramento City, California, at $85 per thousand and five per cent primage. With dated May 26th, 1850.

Trial before Merrick, J., at November Term, 1853, when the plaintiffs introduced evidence tending to show that they got the vessel ready to receive her cargo, and the defendants immediately put on board 78,875 feet of lumber, the stowing of which was completed on the 26th of March, 1850, and which made about three-quarters of a cargo for the vessel; that she lay at the wharf, with the defendant's assent, until the 21st of May, when the defendants took away their lumber; and that by this act of the defendants the vessel was delayed, in procuring other freight, until the 15th of July, when she sailed for San Francisco.

The plaintiffs also offered evidence that, in place of the defendants' lumber, they carried some goods for other persons at a lower rate of freight, and some lumber on their own account, their net earnings upon which were less than the rate of freight agreed to be paid by the defendants. To this evidence the defendants objected; but the judge admitted it, for the purpose of showing how much the plaintiffs ought to deduct from the damages occasioned by the loss of the freight of the defendants' lumber; and instructed the jury that the plaintiffs were entitled to recover the amount of freight and primage which they would have earned if they had taken the defendants' lumber to Sacramento, adding the demurrage for the time they

were delayed to obtain other freight, and deducting the freight they received from other shipments of goods of other persons, and their net earnings on their own shipments.

The jury returned a verdict for the plaintiffs, and assessed damages at $6,020.75. The defendant moved for a new trial on the ground that these rulings and instructions were erroneous.

Dewey, J. This case is put by the plaintiffs upon the grounds upon which damages are given on a contract to ship goods to a given port, when, through the default of the shipper, the goods, although the voyage is commenced, do not reach the port of discharge. In such cases, as appears well established by the cases cited by the counsel for the plaintiffs, the entire freight is earned, and must be paid by the shipper. The next inquiry is whether the case at bar is of like character? It was urged in the argument, that placing the goods on board ship preparatory to sailing was equivalent to the actual commencement of the voyage in its consequences as to the right of the carrier to recover full freight. We find no authority for that position. Indeed, the rule as to what constitutes the commencement of a voyage, in reference to liability for freight, is well settled otherwise. That rule is, that the voyage commences upon breaking ground for the voyage, and not before. Curling *v.* Long 1 Bos. & Pul. 636; Burgess *v.* Gun, 3 Har. & Johns. 225; Smith's Merc. Law (Amer. ed.), 308. No freight is due before the commencement of the voyage, and no lien exists therefor.

The case of the plaintiffs is not, therefore, one of a voyage commenced, and a subsequent prevention of the carriage of the goods to the port of delivery through the default of the shipper. It is a case of an executory contract to ship goods, which the shipper refuses to fulfil on his part. The defendants agreed to ship on board the plaintiffs' vessel seventy-five thousand feet of lumber for California, and to pay the plaintiffs a stipulated sum for the same. The plaintiffs aver that they were ready to perform their contract, but were prevented by the acts of the defendants. Assuming this to be so, the further inquiry is, what is the rule of damages in such case?

The measure of damages is full indemnity for all they have lost through the default of the shippers. The mode of ascertaining the amount of damages for a breach of an executory agreement must, of course, differ in different classes of cases. If it were a contract to employ the plaintiffs to build a house, and pay them an agreed price for the entire work, and the defendants had prevented the performance, the proper rule would seem to be the difference between the sum agreed to be paid, and the sum that it would have cost the plaintiffs to perform the contract. That rule does not meet the cases of contracts for freight, as they are generally made. It does not meet the case of a vessel engaged in carrying merchandise generally for all who may apply, and making up her cargo from various owners of goods. Such ship usually must sail on or about a given day, to

fulfil her other contracts, thus leaving no time or opportunity to fill up the deficient cargo, and also necessarily incurring all the expenses that would have been incident to the voyage, had the shipper fulfilled his particular contract to furnish a certain amount of goods for the voyage.

On the other hand, if the shipper's contract were to fill the entire ship with his goods at a certain freight, upon his refusal or neglect to fulfil his contract, the carrier might abandon the whole voyage, and engage in some new adventure equally or more profitable, and thus all future expenses incident to the first voyage be saved. Here it is quite obvious the damages would be much less than in the case of a voyage that must be performed, notwithstanding the failure of a single individual customer to ship his goods according to contract.

So, too, if under no obligation to other shippers to sail at a given day, or if that day was so remote, and the demand for transportation of goods such as to afford full opportunity to fill up the ship before the day of sailing, these circumstances would materially affect the amount required to be paid by the shipper to the carrier, to indemnity him for the non-performance of the contract on his part.

It seems, therefore, proper that all the attendant circumstances be brought before the jury in each particular case, to enable them to estimate the proper sum to be awarded as damages for a breach of contract of this nature. The carrier is to receive full indemnity for the breach of contract on the part of the shipper. He is to be made as good, in a pecuniary point of view, as if the shipper had furnished the goods according to his contract, if the carrier has been guilty of no laches as to substituting other freight, or adopting other available arrangement to mitigate the loss, or avoid the expenditure incident to the proposed voyage. But if by proper and reasonable efforts he can substitute other goods, he is bound to do so, and, to the extent of the freight thus received, this should go in reduction of the damages. Nor is the reduction necessarily confined to his receipts from goods actually substituted. The carrier may have been remiss in his attempts to fill up his ship, or have neglected to avail himself of opportunities presented by other offers of goods, and if guilty of negligence in these respects, this may be a ground for a deduction from the entire sum stipulated to be paid by a shipper for freight of certain articles which were not furnished to the carrier.

It may be also that the carrier was under no obligation to others to prosecute the proposed voyage, and might have abandoned it for another and more profitable employment of his ship, and in such case he should not pursue the original voyage for the mere purpose of charging the defaulting shipper with the gross sum he stipulated to pay for transporting his goods to a distant port.

It will be perceived, therefore, that a somewhat broader line of defence should have been permitted to the defendants, than that

prescribed at the trial. It is true that the plaintiffs are entitled to the full benefit of their contract, and to the entire damage they have sustained through the default of the defendants. But the sum the shippers stipulated to pay for freight is subject to be reduced by money actually received for substituted freight, and also by the amount which the carrier might have made, had he availed himself of all proper opportunities to fill up the vacancy, and to mitigate the loss that would attach to the shipper by the payment of the entire sum stipulated to be paid for freight.

See on this subject, Heckscher *v.* McCrea, 24 Wend. 304; Shannon *v.* Comstock, 21 Wend. 457; Costigan *v.* Mohawk & Hudson River Railroad, 2 Denio, 610; Abbott on Shipping, 411; Sedgw. Damages, 361. *New trial ordered.*

A new trial was had at this term and resulted in a verdict of $3,052.99 for the plaintiffs.

SAYWARD *v.* STEVENS.

3 Gray (Mass.), 97. 1854.

ASSUMPSIT to recover a balance due for freight of an invoice of lumber from Boston to San Francisco.

The plaintiffs gave in evidence a bill of lading dated at Boston, January 18th, 1850, and signed by their agent, of which the material part was as follows: "Shipped in good order and condition by Hiram Stevens on board the good bark 'Galileo,' Sutton, master, now lying in the port of Boston, and bound for San Francisco, to say, 1,900 feet boards, planed one side; 11,089 feet boards, planed two sides, more or less; eleven packages window frames and sashes; seven boxes shingles; two boxes hardware; one package doors; twelve doors; four kegs nails; one package sash (skylight); four packages stair stuff; four packages nine pieces door frames; two thousand clapboards; four packages blinds; two hundred and forty-eight pieces house frame; to be received by consignee within reach of the ship's tackle within ten days after arrival; if not received, the captain to have the right to sell them:" "And are to be delivered in like good order and condition at the aforesaid port of San Francisco (the danger of the seas only excepted) unto H. Stevens or his assigns, he or they paying freight for said goods $926.39, and five per cent primage and average accustomed:" "Seven boxes of shingles on deck."

There was also evidence of the following facts: All the articles named in the bill of lading were received by the plaintiffs on board the bark "Galileo" at Boston; and the shingles, as well as some of

the packages of door casings, window frames and sashes, and stair stuff, and a portion of the boards, were stowed on deck. All the articles so stowed were thrown overboard and lost by stress of weather. The remainder of the invoice, being stowed in the hold, arrived in safety at the port of discharge. Notice was immediately published in the newspapers to consignees to receive their goods. After waiting thirty days, no one appearing to claim these goods, they were advertised for sale at public auction, by the description in the bill of lading, the plaintiffs' agent at San Francisco not knowing that the whole had not arrived in safety; and they were sold, accordingly, by said description, except the boards, which were sold by the foot. The proceeds of the sale, deducting expenses, were $662.13, which were credited to the defendant on account of the freight. Upon delivery of the goods, the loss of about one thousand feet of boards and of the other articles stowed on deck was ascertained; and the plaintiffs' agent settled with the purchaser for this deficiency by repaying him the sum of $75. Goods of the same kind and quality as those lost could be readily purchased at San Francisco at that time.

The plaintiffs offered to prove that all the articles stowed on deck were so stowed with the defendant's knowledge and assistance. But the judge rejected the evidence, and ruled that the bill of lading expressed the contract between the parties; that, in the absence of any fixed usage of trade to carry such freight in a particular manner, the obligation of the carrier, so far as the place of stowing was concerned, was to carry safely, excepting perils of the seas; and that this obligation could not be varied by parol evidence of knowledge of the owner of the goods of the manner in which they were stowed.

The defendant offered parol evidence that the several articles named in the bill of lading were originally obtained and prepared and fitted for one house, and intended to be put together as such in San Francisco. To this evidence the plaintiffs objected; but the judge admitted it, and instructed the jury that if they believed that the articles enumerated in the bill of lading constituted the parts of one house, and the portions lost were lost by reason of their being improperly stowed on deck, and were a substantial part of the house, without which the house would be wholly incomplete, and of no practical utility as a house, in short, no longer the article which was shipped, then, the freight being payable on the whole in one entire sum, the plaintiffs could not recover freight for the lumber actually carried, and which arrived at San Francisco, although the lost articles could be easily supplied in the market by the purchase of others of like character.

The jury returned a verdict for the defendant, and the plaintiffs alleged exceptions.

Bigelow, J. The main question in this case arises on the true interpretation of the contract between the parties, by which the

plaintiffs agreed to convey the articles enumerated in the bill of lading from Boston to San Francisco. To arrive at this, it is necessary in the outset to determine whether this contract rests solely in the bill of lading, and is to depend upon the terms by which it is therein set forth, or whether it can be varied or explained by parol proof of the acts and conduct of the parties prior to and at the time of the shipment of the merchandise.

The rule is well settled, that, under the ordinary forms of bills of lading, the contract imports that goods are to be stowed under deck; and if carried on deck, the owners of the vessel will not be protected from liability for their injury or loss, by the usual exception of dangers of the sea. Abbott on Shipping (5th Amer. ed.), 345, *note*. Whether this is a mere presumption, arising from the usual mode of conveying merchandise in vessels, and therefore liable to be rebutted in a particular case by proof of a parol contract between the owners of the vessel and the shipper that the goods were to be carried on deck, or by evidence of circumstances from which such agreement might be properly inferred, such as usage affecting a particular trade or certain kinds of merchandise, we have no occasion in the present case to determine. It may, however, be remarked, that as bills of lading do not usually contain any express stipulation concerning the place or mode of stowing the cargo, these being left to the care and discretion of the master of a vessel, the admission of such evidence would not seem to be a violation of the salutary rule that written contract cannot be varied or controlled by parol proof.

In the present case, the bill of lading is not in the usual form. It contains an express agreement or memorandum in writing concerning the stowage of a portion of the articles shipped, which takes it out of any special rule applicable to contracts of this nature, and brings it within the general rule by which all contracts in writing are governed. The memorandum is in these words: "Seven boxes of shingles on deck." The effect of this stipulation clearly is, that the parties are not by their contract left to the ordinary presumption concerning the stowage of the cargo, nor to the usage of trade by which it may have been regulated. They have made it matter of express agreement. Looking at the nature of the contract, and taking into view not only what the parties have expressly stipulated, but also the general duty of the carrier to stow and carry under deck merchandise destined for a long voyage to a distant port, we think the bill of lading in this case is equivalent to an express agreement that the seven boxes of shingles should be carried on deck, and the residue of the shipment should be stowed under deck. In order to give any effect to the written memorandum, it necessarily imports that no part of the merchandise specified in the bill of lading is to be carried on deck, except the articles expressly included within it. To a contract thus expressed, the maxim *expressio unius exclusio alterius* is peculiarly applicable. The only fair and legitimate

inference from the terms of the contract is, that the parties, before reducing their agreement to writing, conferred together concerning the stowage of the cargo, and, as a result of their ultimate intention, stipulated that only the seven boxes of shingles should be carried on deck. In this view, it is very clear that the parol proof offered at the trial tended directly to vary the terms of the written agreement, and was therefore rightly rejected.

The more important question in the case arises upon the true construction of the contract of shipment, as it is expressed in the bill of lading. The general rule is, that all contracts for the conveyance and delivery of merchandise for an agreed price are in their nature entire and indivisible; and unless completely performed by the carrier, he is not entitled to any compensation. The undertaking is not only to carry the goods to a particular destination, but it also includes the duty of delivering them in safety; and no freight is earned until the contract for delivery, as well as of carriage, is completely fulfilled. Chit. Con. (8th Amer. ed.), 636; Angell on Carriers, § 397.

There are exceptions to this general rule, founded on principles of justice and equity, arising out of particular circumstances; but the rule itself is elementary, and lies at the foundation of this species of contract. Indeed, the definition of a bill of lading, as given by high authority, is, that it is the written evidence of a contract for the carriage and delivery of goods sent by sea, for a certain freight. Its peculiarity is, that unless freight is wholly earned by a strict performance of the voyage, no freight is due or recoverable. The contract of the carrier is indivisible, and he can recover for no portion of the voyage that has been made, until the whole is finished and the goods have reached their destination. Mason *v.* Lickbarrow, 1 H. Bl. 359; Angell on Carriers, § 398. The operation of this rule is sometimes hard and inequitable. For this reason, courts of law have, in many cases, readily seized upon any features in contracts for transportation from which it could be fairly inferred that the parties intended to make them divisible and apportionable; while in other cases they have given such interpretation to the acts of parties as to substitute, in the place of the original entire contract, a new agreement, by which the shipper became bound to pay a proportional freight, although the carrier had not fulfilled the whole of the original contract on his part. Within the former class of cases are comprehended all contracts of affreightment by charter-party or bills of lading, where the freight is payable by the ton, by admeasurement, by the package or barrel, or where different portions of the same cargo are shipped upon distinct and separate terms as to freight. In all such cases, it is held that the delivery of the cargo is in its nature divisible, and the contract itself furnishes the means and the measure of apportioning the freight according to the quantity of the cargo actually delivered. Abbott on Shipping,

266; Ritchie *v.* Atkinson, 10 East, 295. Within the latter class are included all cases where the shipper or consignee, by a voluntary acceptance of his goods at an intermediate port, or by a receipt of a portion of an entire shipment at the place of destination, is held to have waived the full performance of the original contract, and to be liable *pro rata* for the carriage of the goods actually received by him. Abbott on Shipping, 406; Ship "Nathaniel Hooper," 3 Sumner, 550, 551.

Upon examination of the contract in the present case, it seems to us very clear that the contract is an entire one, and does not fall within any of the cases which authorize an apportionment of the freight. It is an agreement to transport a certain number of articles from Boston to San Francisco for an entire, aggregate sum as freight. On the part of the owners of the vessel, it is an agreement to carry and deliver all the articles enumerated in the bill of lading, for which the shipper agrees to pay and they agree to receive a sum in gross. The agreement to carry and deliver goes to the whole consideration to be paid therefor. They are mutual agreements, but that of the owners of the vessel is precedent to that of the shipper. The entire carriage and delivery were to be performed before any title to the freight-money accrued to the owners. Such is the legal construction of the usual contract for the carriage of goods. That it is the necessary interpretation of the contract of the parties in the present case results not only from the entirety of the consideration, but also from the nature of the merchandise comprised in the shipment. If it had been a contract for the transportation of a cargo of similar and homogeneous articles, for an entire sum in gross, it might have been urged with some plausibility that the parties contemplated an apportionment of freight, in case of disaster or other cause, by reason of which a portion of the cargo might fail to reach its place of destination. If, for instance, a hundred barrels of flour were shipped under a bill of lading, by which it was stipulated that the freight to be paid therefor should be five hundred dollars; in such case, the delivery of an aliquot part thereof at the place of destination, forming a certain specific and definite proportion of the entire invoice, would furnish the basis of an accurate division and apportionment of the entire freight-money, according to the amount actually carried and delivered. But, in the case at bar, the shipment is made up of a variety of miscellaneous and diverse articles, unlike in kind, quality, and value, incapable of being packed and stowed together, and bearing no definite proportion to each other in size or in cost of transportation. Having reference, therefore, to the nature of the shipment, as well as to the consideration agreed to be paid for the carriage of the articles, it is manifest that the contract affords no basis by which to divide the invoice and apportion the freight. It is an entire invoice, to be carried for an entire sum, incapable of apportionment; and where, from the nature of the con-

tract and its subject-matter, it is fair to infer that the parties intended to make their contract one and indivisible.

It follows as a necessary consequence, that the owners of the vessel, if they failed to transport and deliver the whole of the articles included in the bill of lading, by reason of the neglect of the master, are not entitled to recover the balance claimed by them for freight, unless they can show an acceptance, by the shipper or consignee at San Francisco, of that portion of the shipment which arrived there in safety, and thus bring themselves within the second class of exceptions above stated to the general rule governing entire contracts for the conveyance of merchandise. The case finds that on the arrival of the vessel at its port of discharge no one appeared to receive or claim the goods. The consignee, owing, probably, to the state of the market in San Francisco, by which the merchandise was rendered of less value there than the sum agreed to be paid for the freight, failed to receive it. In the absence of an express stipulation in the bill of lading to meet such a contingency, it might have been the duty of the master, having in his charge an invoice of goods not perishable in their nature, to store them for the benefit of the shippers. It is doubtful whether he would have had the right to sell them. Abbott on Shipping (5th Amer. ed.), 378, *note*; Schooner Cassius, 2 Story, R. 81. However this may be, in the present case there was an agreement in the bill of lading by which it was stipulated that the articles, if not received by the consignee on the day after their arrival, might be sold by the master. There was therefore no receipt of the goods by the regular consignee, from which an acceptance of them can be inferred to charge him or the shipper a *pro rata* freight thereon. It is contended, however, by the plaintiffs, that this clause in the bill of lading, giving the master, by reason of their non-acceptance, a right to sell, and a sale by him in pursuance of it, are equivalent to a receipt of the articles by the consignee; that it substituted the master in his place, and conferred on him the same rights and powers to bind the shipper as his agent, and render him liable for the freight of the goods sold in like manner as the consignee would have been, if he had taken the goods on their arrival. But it appears to us that this agreement is based on too broad a construction of this clause in the bill of lading. The original intent of the parties in the insertion of this provision for a sale of the goods, was to give the master the right to realize his freight-money by a sale of the goods, if they were not received and the money paid within the time specified in the bill of lading. If this was the object of the clause, then, there having been no freight earned, in consequence of the failure to carry the whole shipment, there was no right on the part of the master to sell. He exceeded his authority in making the sale, and the owners cannot bind the shipper by an unauthorized act of their master. But giving to this stipulation the most liberal construction which in any view it is

capable of, it made the master the agent of both parties to sell the goods for the benefit of whom it might concern, and to hold the proceeds for those who should be legally entitled to receive them. It created a special and limited agency only, by which the master had the right to convert the merchandise into money, but not thereby to change the right of property in the proceeds, or to waive the legal rights of the parties under their contract.

We are therefore of opinion that the contract of affreightment in the present case was an entire one, by which the plaintiffs undertook the carriage and delivery of the goods specified in the bill of lading; and a portion of them having been lost through the fault of the master, and there being no proof of an acceptance of that portion which arrived in safety by the shipper or any authorized agent in his behalf, that the plaintiffs are not entitled to recover the balance of freight claimed to be due by them.

It is urged that the plaintiffs were entitled to their freight, because they had replaced the articles lost by payment to the purchasers of a sum equivalent to their value, and thus virtually made good the shipment in San Francisco. But the difficulty in this argument is that the master had no authority from the defendant to change his rights by any such payment. His authority was confined to a sale of the goods which arrived. Beyond that, his acts could in no way affect the defendant, who, if he had been present, would have been entitled to the goods free from any charge for freight.

It is further argued that the owners of a vessel are not responsible for mere abstract and inconsequential negligence on the part of the master, but only for the actual results of his faults and omissions. This may be so; but it does not help the plaintiffs in the present case, because the jury have found, under the instructions given to them, that the goods were lost by reason of their being improperly stowed on deck. It must now, therefore, be assumed that there was actual negligence and fault on the part of the agent of the owners by reason of which they failed to fulfil their contract.

In the view we have taken of this case, it becomes unnecessary to decide upon the admissibility of the evidence which tended to show that the articles shipped were parts of an entire structure, intended to be erected in California. It is quite sufficient, without such proof, that they formed part of an entire subject-matter in the contract; and for the reasons already given, not having been delivered by the plaintiffs according to their agreement, an action cannot be maintained for the freight-money.

Exceptions overruled.

It is clear that, by the general maritime law, freight, whether by charter-party or bill of lading, is due only for articles delivered. The contract, though it consists of two parts, is necessarily one, unless otherwise provided. It is both to convey and deliver, and is

not completed until the delivery. It may be agreed that freight shall be paid on all the goods received on board, as is frequently done in the case of livestock, which is much exposed in the transportation; but, unless the parties otherwise agree, freight is due only for that which is delivered, or for which there is a lawful excuse for non-delivery. 3 Kent, Comm. 225, 226; 1 Pars. Mar. Law, 142–219. If casks or boxes in which goods have been packed arrive empty, or nearly so, so that the goods are not worth the freight, though it was formerly a much-disputed question, it is now settled that they cannot be abandoned by the shipper for freight when this is by ordinary leakage or the natural vice of the articles. 3 Kent, Comm. 324; 1 Valin Comm. 670; Poth. Chart. No. 57; Abb. Ship. (Am. ed.), 433–435. But if lost not by ordinary leakage, but by the dangers of the seas, no freight is due. This will excuse the carrier from paying the price of the goods, but not from a delivery. In the case of ordinary leakage, the carrier has performed his contract, so far as depended on him; in the latter his contract is to carry and deliver the goods, the dangers of the seas excepted, and as he is prevented from a delivery by these dangers, his freight is not earned. **Ware, D. J., in The Cuba, 3 Ware, 260.**

It may happen, however, that goods existing in specie when brought to the place of destination are so deteriorated in condition as not to be worth the freight; and then arises the question whether the merchant is bound to pay the freight, or is at liberty to abandon the goods to the shipowner for his claim. In considering it, the causes from which the deterioration in the merchandise may proceed must be distinguished. If it proceeds from the fault of the masters or mariners, the merchant is entitled to a compensation and may recover it against the owners or master. On the other hand, if the deterioration proceeds from an intrinsic principle of decay naturally inherent in the commodity itself, whether active in every situation or only in the confinement and closeness of the ship, the merchant must bear the loss and pay the freight. The master and owners are in no fault; nor does their contract, though taken as the contract of common carriers, contain an insurance or guaranty against such an event. Maclachlan on Shipping, 469, as quoted with approval in *Seaman v. Adler*, 37 Fed. R. 268.

The master has a lien on the property to enable him to earn his freight. The moment the transportation begins, the lien attaches, and is not divested so long as the master is proceeding not in default. The consignee is not bound to pay until the transportation is completed in accordance with the contract, but he may not prevent the master's earning his freight. If he takes possession of the goods

short of their destination, when the master, not in default, is willing and able to complete the transportation, he must pay full freight. He has prevented or waived the performance of the condition precedent. The law, therefore, regards it as performed. It is true that in this case the performance was prevented by the consignee, and not by the shipper; but in this respect the consignor is represented by the consignee, and the former is responsible for the acts of the latter. The consignor has done his full duty to the consignee when he has paid or agreed to pay freight to a certain point. If the consignee sees fit to take the goods at some other place when the transportation is only partially completed, and when the master is able and willing to perform his contract, he, the consignee, can make no claim against the consignor, and the latter should therefore pay the freight which the master was able, willing, and had a legal right to earn. There can be no action unless delivery is either made or prevented from being made by the act or fault of the shipper or consignee. 1 Pars. Shipp. & Adm. 220. Per Corliss, C. J., in Braithwait *v.* Power, 1 N. Dak., 455.

WESTERN TRANSP. CO. *v.* HOYT.

69 N. Y. 230. 1877.

Appeal from judgment of the General Term of the Supreme Court, in the second judicial department, affirming a judgment in favor of defendants, entered upon an order nonsuiting plaintiff on trial.

This action was brought by plaintiff as a common carrier to recover freight and charges on a cargo of oats alleged to have been transported for and delivered to defendants.

Plaintiff received the oats at Buffalo, giving the following bill of lading therefor: —

"Buffalo, October 9th, 1869.

"Shipped by Barclay, Bruce, & Co., in apparent good order, on board canal-boat 'Clio,' of W. T. Co. Line, Captain ———, the following described property, to be transported to the place of destination, without unnecessary delay, and delivered to the consignees, in like good order, as noted below in the customary manner, free of lighterage, upon payment of freight and charges, as prescribed in this bill. Consignees to pay all harbor towing, from and to the usual place of landing. Three week-days, regardless of weather after arrival, and notice of same, to be allowed consignees to discharge this cargo, after which time the cargo or consignees are to pay demurrage, at the rate of one and one-half per cent per day, upon the freight, including tolls, for each and every day of such demurrage, over the three days as above specified, until the cargo is fully discharged. All damage, caused by the boat or carrier, or deficiency in the cargo, from quantity, as herein specified, to be paid for by the carrier, and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignees.

In case grain becomes heated while in transit, the carrier shall deliver his entire cargo, and pay only for any deficiency, caused by heating, exceeding five bushels, for each one thousand bushels. The freight, charges, and demurrage, payable to ——— or order, at the place of destination, who is the only party authorized to collect the same, and whose receipt shall be in full, for all demands on this cargo or bill of lading.

"Bills on this cargo having been advanced by shippers, if refunded, must be to them or their order.

"Acc. Geo. Ellison,	14,650 bush. No. 2 oats, ex. cargo.
"Care Jesse Hoyt & Co.,	Bk. Pathfinder, Canal.
"New York,	Frt. Buff. to N. Y., 10.
	"Lake frt. and Buff. Chgs., $5\frac{3}{4}$ — 842.38.

"Subject to Barclay, Bruce, & Co.'s sight draft on Messrs. Jesse Hoyt & Co., New York, for fifty-six hundred and three 63-100 dollars for advances.

"The W. T. Co.,
"G. P. Morgan."

The boat with the oats arrived safely at New York, Friday, November 5th, 1869, and notice thereof was given to the consignees on the same day at ten minutes past twelve. On the next day, and on Monday, defendants were requested to give the boat despatch, and on Tuesday, the 9th November, they were notified that unless the cargo was discharged it would be put in store. On the 9th, 5,000 bushels were removed from the boat by an elevator procured by defendants. After the delivery of that amount, the elevator stopped. Plaintiff's agent thereupon directed that if the boat was not discharged by six P.M. to take it to store. At about that hour, it not having been discharged, it was by plaintiff's order taken to Brooklyn, and the oats stored with one Barber, a warehouseman. In March, 1871, Barber delivered the possession of the oats to defendants upon their demand, they indemnifying against any claim of the plaintiff.

Further facts appear in the opinion.

Church, Ch. J. The decision in the case of the present plaintiff against Barber, 56 N. Y. 544, disposes of some of the questions involved in this case. That was an action for conversion against the warehouseman for delivering the oats to the defendants, and it was there held that the proper construction of the bill of lading was to give the defendants, who were consignees, three full week-days to discharge the cargo, and such reasonable time after that period as the circumstances might require, upon paying the specified demurrage, but that the carrier might terminate this additional privilege or right by a proper notice. It appears in this, as in that case, that notice of the arrival of a boat, "Clio," was given to the consignees, on Friday, at ten minutes past twelve, and it was not disputed on the trial that when the notice is after twelve o'clock, that day is not to be counted as any part of the three days given absolutely for the discharge of the cargo, and it appeared, and seems not to have been disputed, that the three days would not expire until Tuesday night at twelve o'clock. We hold that the act of the carrier in removing

his boat, and storing the grain elsewhere, on Tuesday, prior to the expiration of the three days, was wrongful, and amounted to a conversion, and deprived him of his lien for freight. The case was not materially changed in this respect upon the trial of this action. The notice which was claimed to have been given was given on Tuesday morning, to the effect that unless the cargo was discharged on that day the oats would be stored. Such a notice would not relieve the plaintiff from the consequences of his wrongful act in storing the oats, for the reason that the day extended, as was proved, to midnight, and the plaintiff violated the notice by removing the boat several hours previously. He could not by a notice shorten the time fixed by the contract itself. The construction of the bill of lading, the character of the act of the plaintiff in storing the oats, and the effect of the act upon its rights to a lien for freight must be regarded as adjudged and settled in the case referred to.

Other questions are presented upon this appeal, which must be considered. About 5,000 of the 14,000 bushels of the oats were removed from the boat by the elevator procured by the defendants, and the remainder were stored in Barber's warehouse. Subsequently, the defendants demanded and obtained possession of the oats from Barber upon giving him indemnity against any claim of plaintiff for freight or for the oats. It is urged that the defendants taking possession of the property entitled the plaintiff to the freight. There is some apparent plausibility in equity in this position, but it must be observed that a delivery to the consignees is as much a part of the contract as the transportation. Mr. Angell, in his work on carriers, says: "It is not enough that the goods be carried in safety to the place of delivery, but the carrier must, without any demand upon him, *deliver*, and he is not entitled to freight until the contract for a complete delivery is performed." § 282. When the responsibility has begun, it continues until there has been a due delivery by the carrier. Id., note 1, and cases cited. Parsons on Shipping, 220. And in this case, the bill of lading expressly requires the property to be transported *and delivered* to the consignees. The delivery was as essential to performance as transportation to New York, and it is a substantial part of the contract. The plaintiff might as well, in a legal view, have stopped at Albany, or any other intermediate port, and stored the grain, as to have stored it in Brooklyn. In either case he could not aver a full performance, nor that he was prevented by the defendants from performing. It follows that he cannot recover upon the contract. Performance is a condition precedent to a recovery. As said by Lord Ellenborough in Liddard *v.* Lopes, 10 East, 526, "The parties have entered into a special contract by which freight is made payable in one event only, that of a right delivery of the cargo according to the terms of the contract, and that event has not taken place, there has been no such delivery, and consequently the plaintiff is not entitled to recover."

As the plaintiff cannot recover under the contract, if he has any claim for freight it is only for *pro rata* freight, which is sometimes allowed, when the transportation has been interrupted or prevented by stress of weather or other cause. In such a case, if the freighter or his consignee is willing to dispense with the performance of the whole voyage, and voluntarily accept the goods before the complete service is rendered, a proportionate amount of freight will be due as "freight *pro rata itineris*." This principle was derived from the marine law, and it is said that the common law presumes a promise to that effect as being made by the party who consents to accept his goods at a place short of the port of destination, for he obtains his property with the advantage of the carriage thus far. The principle is based upon the idea of a new contract, and not upon the right to recover upon the original contract. The application of this principle has been considerably modified by the courts. In the early case of Luke *v.* Lyde, 2 Burr. 889, a contract was inferred from the fact of acceptance, and the rule was enunciated without qualification that from such fact, without regard to the circumstances, and whether the acceptance was voluntary or from necessity, a new contract to pay *pro rata* freight might be inferred. Some later English cases, and the earlier American cases, apparently followed this rule; but the rule has been in both countries materially modified, and it is now held that taking possession from necessity to save the property from destruction, or in consequence of the wrongful act of the freighter, as in Hunter *v.* Prinsey, 10 East, 394, and in 13 M. & Wels. 229, where the master caused the goods to be sold, or when the carrier refused to complete the performance of his contract, the carrier is not entitled to any freight. Parke, B., in the last case, stated the rule with approval, that to justify a claim for *pro rata* freight there must be a voluntary acceptance of the goods at an intermediate port, in such a mode as to raise a fair inference that the further carriage of the goods was intentionally dispensed with; and Lord Ellenborough, in Hunter *v.* Prinsey, *supra*, said: "The general property in the goods is in the freighter; the shipowner has no right to withhold the possession from him unless he has either earned his freight or is going to earn it. If no freight be earned, and he decline proceeding to earn any, the freighter has a right to the possession."

Thompson, Ch. J., in 15 J. R. 12, said: "If the shipowner will not or cannot carry on the cargo, the freighter is entitled to receive his goods without paying freight." It was unnecessary to review the authorities. The subject is considered in Angell on Carriers, § 402 to 409, and Abbott on Shipping, 5th Am. ed. 547, and in the notes and numerous cases referred to, and the rule as above stated seems to have been generally adopted by nearly all the recent decisions, and its manifest justice commends itself to our judgment. In this case no inference of a promise to pay *pro rata* or any freight

can be drawn. The circumstances strongly repel any such intention. The carrier doubtless acted in accordance with what it believed to be its legal rights, but the act of storing was a refusal to deliver, and, as we held in the Barber case, *supra*, a wrongful act amounting to conversion, quite equal in effect to the sale of the goods in the cases cited. The carrier must therefore be regarded as refusing to deliver the oats. Neither the owner nor his consignee intended to waive a full performance or to assume voluntarily to relieve the plaintiff from non-performance. They claimed the possession of the property and the right to possession discharged from all claim for freight, and indemnified the warehouseman against such claim. Every circumstance repels the idea of a promise to pay *pro rata* freight. The case stands, therefore, unembarrassed by the circumstance that the consignee took possession of the property under the circumstances, and it presents the ordinary case of an action on contract where the party seeking to enforce it has not shown a full performance.

The next question is, whether the plaintiff is entitled to freight upon the 5,000 bushels delivered. The contract for freight is an entirety, and this applies as well to a delivery of the whole quantity of goods as to a delivery at all, or as to a full transportation. Parsons on Shipping, 204. There are cases where this rule as to quantity has been qualified, but they have, I think, no application to the present case. The delivery of the 5,000 bushels was made with the understanding and expectation that the whole quantity was to be delivered, and no inference can be drawn of an intention to pay freight in part without a delivery of the whole. The quantity delivered must be regarded as having been received subject to the delivery of the whole cargo. There was no waiver. The principle involved is analogous to a part delivery from time to time of personal property sold and required to be delivered. If the whole is not delivered, no recovery can be had for that portion delivered. 18 Wend. 187; 13 J. R. 94; 24 N. Y. 317.

The claim for lake and Buffalo charges stands, I think, upon a different footing. These are stated in the bill of lading at $5\frac{3}{4}$ cents a bushel, amounting to $842.38. It must be presumed, as the case appears, that the plaintiff advanced these charges; and, if so, it becomes subrogated to the rights of the antecedent carrier. The claim for these charges was complete when the plaintiff received the property to transport, and was not merged in the condition requiring the performance of the contract by the plaintiff to transport the property from Buffalo. That contract was independent of this claim. The bill of lading is for transportation and delivery upon payment of freight and charges; but if the plaintiff had a right to demand any part of the charges independent of the bill of lading, that instrument would not deprive him of such right. We have been referred to no authority making a liability upon such an advance dependent upon the performance of the contract for subse-

quent carriage. If the action had been by the lake carrier to recover for the freight to Buffalo, it is very clear that the defendants could not have interposed as a defence that the carrier from Buffalo had not performed; and why is not the plaintiff entitled to the same rights in respect to this claim as the former carrier?

I am unable to answer this question satisfactorily, as the case now appears.

If these views are correct, a nonsuit was improper, and there must be a new trial with costs to abide event.

Judgment reversed.

WOOSTER *v.* TARR.

8 Allen (Mass.), 270. 1864.

Contract to recover for the carriage of mackerel from Halifax to Boston.

It was agreed in the Superior Court that the defendants shipped the mackerel at Halifax, upon a vessel of which the plaintiffs were part owners, said Wooster being master, under a bill of lading in the usual form, to be delivered at Boston "unto Messrs. R. A. Howes & Co., or to their assigns, he or they paying freight for said goods," etc. On the arrival of the vessel at Boston, Wooster was informed by Howes & Co. that the mackerel had been sold "to arrive," to a person to whom they requested him to deliver them. The mackerel were accordingly delivered, and payment demanded of Howes & Co., but refused. Howes & Co. were then and still are insolvent. The mackerel, at the time of their delivery on board the vessel, had been purchased and paid for by the defendants for and on account of Howes & Co., at whose risk they were after shipment; but this fact was unknown to the plaintiffs. The mackerel were entered at the custom-house in Halifax in the name of the defendants.

Upon these facts judgment was rendered for the plaintiffs, and the defendants appealed to this court.

Bigelow, C. J. The question raised in this case is very fully discussed in Blanchard *v.* Page, 8 Gray, 281, 286, 290–295. It is there stated to be the settled doctrine that a bill of lading is a written simple contract between a shipper of goods and the ship-owner; the latter to carry the goods, and the former to pay the stipulated compensation when the service is performed. Of the correctness of this statement there can be no doubt. The shipper or consignor, whether the owner of the goods shipped or not, is the party with whom the owner or master enters into the contract of affreightment. It is he that makes the bailment of the goods to be carried, and, as the bailor, he is liable for the compensation to be paid therefor. The *dictum* of Bayley, J., in Moorsom *v.* Kymer,

2 M. & S. 318, subsequently repeated by Lord Tenterden in Drew *v.* Bird, Mood. & Malk. 156, that in the absence of an express contract by the shipper to pay freight, when the goods are by the bill of lading to be delivered on payment of freight by the consignee, no recourse can be had for the price of the carriage to the shipper, has been distinctly repudiated, and cannot be regarded as a correct statement of the law. Sanders *v.* Van Zeller, 4 Q. B. 260, 284; Maclachlan on Shipping, 426.

It is contended, on the part of the defendants, that the omission of the master to collect the freight of the consignees of the cargo or their assigns, under the circumstances stated, was a breach of good faith towards the shippers, which operates as an estoppel on him and the other owners of the vessel, whose agent he was, to demand the freight-money of the defendants. But there are no facts on which to found an allegation of bad faith against the master. He did not act contrary to his contract or inconsistent with his duty towards the shippers. It is true that he omitted to enforce his lien on the cargo for the freight, by delivering it without insisting on payment thereof by the consignees. This was no violation of any obligation which he had assumed towards the defendants as shippers of the cargo. A master is not bound at his peril to enforce payment of freight from the consignees. The usual clause in bills of lading that the cargo is to be delivered to the person named or his assignees, "he or they paying freight," is only inserted as a recognition or assertion of the right of the master to retain the goods carried until his lien is satisfied by payment of the freight, but it imposes no obligation on him to insist on payment before delivery of the cargo. If he sees fit to waive his right of lien and to deliver the goods without payment of the freight, his right to resort to the shipper for compensation still remains. Shepard *v.* De Bernales, 13 East, 565; Domett *v.* Beckford, 5 B. & Ad. 521, 525; Christy *v.* Row, 1 Taunt. 300. Although the receipt of the cargo under a bill of lading in the usual form is evidence from which a contract to pay the freight-money to the master or owner may be inferred, this is only a cumulative or additional remedy, which does not take away or impair the right to resort to the shipper on the original contract of bailment for the compensation due for the carriage of the goods.

Judgment for the plaintiffs.

MERIAN *v.* FUNCK.

4 Denio (N. Y. Sup. Ct.), 110. 1847.

Error to the Superior Court of the city of New York. Funck and the other defendants in error sued Merian & Benard in the court below, in *assumpsit*, for freight and primage on a quantity of goods

shipped at Havre, and brought to the port of New York in the packet-ship "Baltimore," of which the plaintiffs were the owners. The first parcel, consisting of nine packages, was received into the public store in New York, on a general order to discharge the ship, on the 11th of November, 1839, and was delivered therefrom to Messrs. Mainon & Bonnay on the 22d of February thereafter. The other parcel, consisting of ten packages, was brought on a subsequent voyage of the ship "Baltimore," five of which were received into the store on a like order on the 26th of March, 1840, and delivered to Mainon & Bonnay on the 22d of April thereafter, and the remaining five packages were delivered to the same persons from the ship. The bills of lading signed by the master were produced, and by them it appeared that the goods were shipped at Havre by one J. Troussel, and that the master engaged to carry them to the port of New York and *there to deliver them to the defendants or to their order, on paying freight and ten per cent. primage.* When the ship arrived at New York upon each of the voyages, the plaintiffs' agent caused a bill of the freight of these goods, and of other goods imported by the defendants in the same vessel, to be made out and presented to the defendants. They requested that the freight now in question should be made out by the agent in separate bills against Mainon & Bonnay, which was done; and the bills for such freight were presented to them, and they repeatedly promised to pay the amount. They failed in July, 1840, without having paid the bills, having on that day executed a general assignment for the benefit of their creditors, to the defendants, to whom they owed a considerable amount. The goods for which freight is claimed in this suit, or a considerable part of them, passed under this assignment. The bills of lading were severally indorsed by the defendants, with a direction to deliver the goods to Mainon & Bonnay. The indorsement on the bill of lading of the first parcel was dated February 21, 1840; the other indorsement was without date.

Pierre Bonnay, one of the firm of Mainon & Bonnay, was examined on the part of the defendants, and testified that the goods on which the freight was charged were ordered and purchased by the witness's house of a house in France, and that the defendants had no interest in them; that they were forwarded to the witness through the defendant's house, in order that the witness might settle for the purchase price with the defendants, according to a practice which prevailed in respect to importations by the witness through the defendant's house; that the invoices of the goods were made out to the witness's house, but the bill of lading was sent to the defendants, to be transferred on their receiving payment of the cost of the goods.

The court charged the jury that the defendants were liable for the freight claimed, unless there was an express agreement on the part of the plaintiffs to look to Mainon & Bonnay for the same, and to

absolve the defendants from their obligation. The defendants' counsel excepted, and the jury gave a verdict for the plaintiffs, upon which the court below rendered judgment. A bill of exceptions having been signed, the defendants brought error.

JEWETT, J. The obligation to pay freight rested on the bill of lading, by which its payment was made a condition of delivery to the consignee or to his order. The master was not bound to part with the goods until the freight was paid; but he did not, by delivering the goods before payment, waive or discharge his legal right to demand payment of the person who, by the principles of law, was primarily liable to pay. It is well settled that when the goods, by the terms of the bill of lading, are to be delivered to the consignee or to his order, on payment of freight, the party receiving them, whether the consignee or an indorsee, to whom the bill of lading has been transferred by the consignee, makes himself responsible for the payment of the freight. The law implies a promise on his part to pay the freight, such being the terms on which, by the bill of lading, the goods were to be delivered. The person who accepts and receives the property thereby makes himself a party to the contract. In this case the goods were consigned to the defendants, or to their order. They indorsed the bills of lading and ordered a delivery to Mainon & Bonnay, to whom the goods were delivered. They, and not the defendants, were therefore bound to pay the freight. Cock *v.* Taylor, 13 East, 399; Trask *v.* Duval, 4 Wash. C. C. R. 184.

In Tobin *v.* Crawford, 5 Mees. & Wels. 235, affirmed on error in the Exchequer Chamber, 9 id. 716, the bills of lading made the goods deliverable to the shipper's order, or to his assigns, on paying freight; the shipper indorsed the bills of lading and forwarded them to the defendants, who indorsed them to their agents, and the agents received the goods. It was held that the defendants were not liable for the freight, because the contract was with the shipper in the first instance, and afterwards with the agents receiving the goods, but not with the defendants, they having given no authority, express or implied, to pledge their credit for the freight. The only authority which could be implied was to receive the goods, paying the freight on delivery. The case establishes the principle that the party who actually receives the goods under the bill of lading becomes thereby a party to its stipulations respecting freight. The charge of the court below was therefore erroneous, and the judgment must be reversed.

Judgment reversed.

SCAIFE *v.* TOBIN.

King's Bench. 3 Barn. & Ad. 523. 1832.

This was an action by the plaintiffs as surviving owners of the brig "Solon," against the defendant as consignee at Liverpool of goods shipped on board the "Solon" at Demerara, upon a voyage from that place to Liverpool, for average loss. At the trial before Bayley, J., at the summer assizes for Cumberland, 1830, the jury found a verdict for the plaintiffs, subject to the opinion of this court on the following case: —

The brig "Solon" sailed from Demerara on a voyage to Liverpool, on the 6th of January, 1829, having on board goods shipped by one Cramer on his own account, and other goods shipped by J. J. Starkey on his own account, and on the several accounts of two other parties. They were consigned to the defendant by four several bills of lading, each expressing the goods mentioned in it were *to be delivered to the defendant or his assigns, paying freight for the same with primage and average accustomed.* The goods were so consigned at the risk of the consignors. The course of dealing between the consignors and the defendant was, that the former, upon making shipments, drew bills upon the defendant, who sold the consignment on their account, carried the proceeds of the sale to their credit, and debited them with the amount paid by him upon their bills, charging a commission upon the sales. Accounts of these were rendered from time to time as they occurred, and accounts current were usually rendered half yearly to January and July. The defendant sometimes paid charges for general average upon the goods so consigned, and debited the consignors with the amount. Whilst the "Solon" was proceeding on her voyage, the masts were cut away in a storm for the preservation of the ship and cargo, and the loss which gave rise to the present claim for average was thereby occasioned. The vessel put into Holyhead on the 25th of February, and remained there till the 28th, and she then sailed for Liverpool, where she arrived on the 3d of March. Whilst she was at Holyhead, the master wrote a letter to the defendant and the other consignees of the goods on board the vessel, informing them of the damage sustained, and requesting instructions. This letter was received by the defendant before the "Solon" arrived at Liverpool, but no answer was sent. The defendant had also received bills of lading and invoices of the goods consigned to him, on the 25th of February. On the 9th of June he was called upon to pay the average in question. The goods consigned to the defendant were delivered to him after the arrival of the ship, and were sold by him on account of the

consignors, and an account of the sale of Mr. Cramer's goods was rendered to him on the 13th of April, 1829, but no accounts of the sale of the goods of the other consignors were rendered to them until after the 9th of June, when the claim for average was made upon the defendant. The "Solon" was chartered by Mr. Starkey at Demerara, and the defendant gave no orders for the consignment of the goods to him, nor did he know that any goods were consigned to him by the "Solon," till he received the bills of lading and the invoices.

LITTLEDALE, J.[1] There is no doubt that an absolute owner of goods is liable to pay general average. But a mere consignee, who has a special property in the goods, is not so chargeable. He could not even pledge the goods before the late Act of Parliament. The question of liability here depends entirely on the maritime law. It is said that general average bears an analogy to freight, and that if goods be delivered to a consignee, he is liable to pay freight. There is no doubt that a consignee, not the owner of goods, who receives them in pursuance of a bill of lading, in which it is expressed that they are to be delivered to him, he paying freight or demurrage, is liable to those charges; but then he is so liable by reason of a special contract implied by the law from the fact of his having accepted goods which were to be delivered to him only on condition of his paying freight and demurrage. In Jesson *v.* Solly, 4 Taunt. 52, it was said by the court that the consignee by taking the goods adopted the contract; that is, the contract in the bill of lading, whereby the master agreed with the shipper to deliver the goods to the consignee, he paying demurrage and freight. Here, if it had been stated in the bill of lading that the goods were to be delivered to the defendant or his assigns, he or they paying freight and general average, he, by receiving the goods, would have adopted this as his contract, and would be presumed to have contracted to pay to the shipowner those charges, the payment of which was made a condition precedent to the delivery; but here general average is not mentioned. The argument that it would be for the convenience of commerce that a mere consignee, not the owner, should be liable to general average, applies equally to demurrage; but neither the law of England nor the general law of the world makes him so liable. It is said that the defendant is liable because he had notice, before he received the goods, that they were subject to this charge. But the law will not imply a contract to pay general average merely because the defendant, before he received the goods, knew that they were subject to it. As, then, there was no contract, express or implied, to pay general average, the plaintiff cannot recover.

Judgment for the defendant.

[1] Opinion of PARKE, J., is omitted.

WEGENER *v.* SMITH.

Common Pleas. 15 C. B. 285. 1854.

This was an action by the master of a ship called the "Gustave Adolphe," against the defendant, a merchant at Sunderland, for demurrage. Plea, amongst others, never indebted.

The cause was tried before Crowder, J., at the last assizes at Durham. The plaintiff put in a charter-party between one Schreber, a merchant at Stettin, and himself, for the hire of the ship for a voyage to Sunderland with a full cargo of timber. The charter-party provided that the cargo should be brought alongside and put free on board, to be delivered at the port of discharge on payment of a certain measurement freight; and, in case of detention, the captain to be paid £5 for every provable lay-day.

The bill of lading, for the whole cargo, which was indorsed to the defendant, made the goods deliverable to order "against payment of the agreed freight and other conditions as per charter-party."

The defendant received the timber under the bill of lading, but refused to pay the demurrage claimed by the plaintiff, alleging that he was not liable for demurrage; and it was insisted, on his behalf, at the trial, that the action was not maintainable, that the master could not sue, and that the defendant as assignee of the bill of lading was not liable for demurrage, in the absence of a contract on his part, express or implied, to pay it, and that there was no evidence to go to the jury of any such implied contract.

On the other hand, it was insisted, that the reference to the charter-party in the bill of lading incorporated therein all its terms, and amongst others the contract for demurrage.

The learned judge, reserving the points, left the case to the jury, who returned a verdict for the plaintiff, damages £60.

Jervis, C. J.[1] As far as regards the evidence, the whole was a question for the jury; they found for the plaintiff; and I do not understand my brother Crowder to express himself dissatisfied with the verdict. The only question is as to the construction of the words in the bill of lading, "against payment of the agreed freight and other conditions as per charter-party." That refers to the charter-party, which stipulates for demurrage at £5 per day. I think the defendant was clearly liable to demurrage.

[1] Opinions of other judges are omitted.

ASHMOLE *v.* WAINWRIGHT.

Queen's Bench. 2 Q. B. 837. 1842.

Assumpsit for money had and received and on account stated. The particular claimed £5 5*s.*, paid on, etc., by plaintiff to defendants, "in order to obtain possession of certain goods belonging to the plaintiff then in the custody of the defendants, and which said sum," etc., "was paid by the plaintiff under the protest that he was not liable to pay the same or any part thereof; or, if liable to pay some part thereof, that the sum claimed by the defendants, namely," etc., "was an exorbitant and unreasonable claim."

Plea: *Non-assumpsit.* Issue thereon.

On the trial before Coleridge, J., at the Westminster sittings after Hilary Term, 1841, it appeared that, in October, 1839, the defendants, who were common carriers, conveyed certain goods for the plaintiff from Walpole to London, under circumstances which induced the plaintiff to expect that they would make no charge for so doing. The goods, being brought to London, remained some time in the defendants' warehouse, after which, on the plaintiff sending for them, the defendants refused to give them to him except upon his paying £5 5*s.* for carriage and warehouse room. The plaintiff insisted that he was not liable to pay anything; and that if he was liable to pay anything, the demand was exorbitant. In an interview which the plaintiff's attorney had with one of the defendants at their place of business, the latter declared that he would receive nothing less than the whole sum demanded. The attorney called again a few days afterwards, and said to the same defendant, "I suppose you still refuse to take anything less than the whole sum;" to which the defendant said, "Of course I do." The attorney then paid him the £5 5*s.*, and told him that he paid it under protest as to both points. The goods were then given up to the plaintiff. The learned judge put three questions to the jury: 1. Was the plaintiff to pay anything? 2. Was £5 5*s.* an unreasonable sum? 3. If £5 5*s.* was unreasonable, what was a reasonable sum? The jury found that the plaintiff ought to pay something; that the demand of £5 5*s.* was unreasonable; that the reasonable charges were 18*s.* for carriage, and 12*s.* 6*d.* for warehouse room. The learned judge was of opinion that the plaintiff ought to have tendered that or a larger sum; and a verdict was entered for the defendant, with leave for the plaintiff to move to enter a verdict for £3 14*s.* 6*d.* if the court should be of opinion that a tender was unnecessary. [On a rule *nisi.*]

Lord Denman, C. J. As is very commonly the case, each party has taken pains to put himself in the wrong. After carriage of the

goods without express bargain, the owner, the plaintiff, says that the carriers, the defendants, were to carry them for nothing, and he demands the goods: the defendants claim what must now be taken to be a very exorbitant charge, and refuse to deliver the goods except on payment of £5 5*s.*; the plaintiff says, I will pay it under protest that I do not owe you so much. The jury find that the proper sum is £1 10*s.* 6*d.* To the extent of the difference the defendants have received the plaintiff's money; is there anything in the circumstances to deprive him of his remedy as for money received by them to his use? It is said that he ought to have tendered the proper charges: the answer is, that they ought to have told him the proper charges. I can see no other circumstance to deprive the plaintiff of his action in this form: the cases relied on for the defendants are all distinguishable; the utmost extent to which they go is that the action does not lie where there is another adequate remedy; and, as to equity, when the defendants had received such notice as they did, both from the attorney and from the language of the particulars, it was their duty to pay back the sums which they had no right to retain.

Patteson, J. I should be sorry to throw any doubt upon the point that an action for money had and received will lie to recover money paid on the wrongful detainer of goods: it would be very dangerous to do so, the doctrine being in itself so reasonable, and supported by so many authorities. In Lindon *v.* Hooper, 1 Cowp. 414, replevin was as convenient a mode of recovering the money as the action for money had and received; but replevin would not lie here. My only difficulty has arisen from the necessity for a tender. Astley *v.* Reynolds, 2 Strange, 915, at first sight seemed to be somewhat in favor of the present defendants; for there a tender was made; and I am not prepared to go the length of saying that, where a party simply denies that anything is due, then pays, and afterwards sues for the whole sum, he may turn round at the trial and recover part; for his objecting to the whole would be like a deception. In this case, therefore, had there been nothing to show that the plaintiff ever demanded less than to have the goods without any payment, according to his first claim, I should hardly have said that the action would be maintainable. But, on the further conversation and the subsequent applications, an allegation of overcharge is added to the at first total denial: the defendants always demanded the whole; the plaintiff did not altogether insist that nothing at all was due; then the particulars of demand distinctly show that the action was brought, not merely to recover the whole, but to recover the part overcharged, if the plaintiff was liable at all. After such a notice the proper course for the defendant was to pay the difference into court.

Coltman, J. I never doubted that an action for money had and received might be maintained to recover money paid on the

wrongful detainer of goods. Skeate *v.* Beale, 11 A. & E. 983, is not inconsistent with this doctrine. That was an action on a written agreement; duress of goods was pleaded; and the court held that, for that purpose, there was no distinction between an agreement and a deed, so that the agreement must be held to have been voluntary. It is very true that some words in the judgment go beyond the point decided; but they are not necessary to the decision, which is quite consistent with our decision in the present case. Here the only question is on the necessity of tendering or demanding back a specific sum. Taking the particulars altogether, they are clearly meant to convey notice of the plaintiff's intention to recover all or such part as he might be entitled to; and, after hearing the argument, I am satisfied that no tender of any specific sum was necessary. The defendants began wrong by making an exorbitant demand: in whose knowledge, if not in theirs, did the proper charges lie? Surely the duty of ascertaining the proper charge lay on them in the first instance. Looking at the nature of the demand, it could not be for the plaintiff to ascertain the specific sum. See Jones *v.* Tarleton, 9 M. & W. 675.

Rule absolute.

CHASE *v.* ALLIANCE INS. CO.

9 Allen (Mass.), 311. 1864.

Contract upon a policy of insurance issued by the defendants, dated April 25, 1862, by which they insured the plaintiff for one year in the sum of $20,000 on the freight of the ship "Flying Mist," said freight valued at $30,000 on board or not on board. The following facts were agreed in this court: —

On the day when the policy declared on was issued, additional insurance was effected at other offices, in the sum of $10,000, under leave granted in this policy. The ship "Flying Mist" was then under a charter, executed March 4, 1862, at Glasgow, in Scotland, to persons living there, by which it was agreed that she should proceed from London, where she was then lying, "to Glasgow, and there receive on board a full and complete cargo of sheep and other cargo, . . . and therewith proceed to Dunedin, New Zealand, or one other port, as ordered at Otago, . . . freight for the same to be paid at a lump sum of twenty-six hundred and fifty pounds sterling, . . . and, on delivery of the outward cargo, the vessel shall at once sail for Melbourne, Sidney, Launcestown, or Hobart Town, as ordered by charterer's agent at Dunedin, etc. . . . The freight to be paid as follows: Two thousand pounds cash on the final clearing of the ship from Greenock . . . and the balance on right and true delivery of the cargo at Dunedin."

Under said charter the ship sailed for Glasgow and arrived there on April 7th, 1862, completed her loading, and sailed for New Zealand on the 5th of June, and was totally lost by perils of the seas on said voyage, at the entrance of the harbor of Otago, in New Zealand, on the 27th of August, 1862. Due proof of loss was made, and the defendants paid to the plaintiff the sum of $13,235.32, under the policy; and the plaintiff claimed an additional sum as hereinafter stated.

The charterer paid to the master of the ship, on her clearing from Greenock, £2,000, as stipulated in the charter, which sum was agreed to be valued at $10,140.37. It was admitted that no reclamation of this sum has been made; and the defendants contended that the plaintiff was not liable to refund it, and that the same should be deducted from the gross sum insured on the freight, leaving them liable only for the sum which they had already paid. And the question submitted to the court was, whether said sum of $10,140.37 should be so deducted; and it was agreed that the court should enter judgment for the plaintiff for $6,764.68, with interest, or for the defendants, as this question should be determined.

Hoar, J. The first question which the case presents is, whether the payment on account of freight stipulated in the charter-party, and which was made before the vessel sailed from Greenock, can be recovered back by the charterer from the insured. If it can, then the whole valued freight was at risk at the time of the loss, and the plaintiff is entitled to recover.

"The general rule of law," as was said by the Chief Justice in the recent case of Benner *v.* Equitable Ins. Co., 6 Allen, 222, "is, that freight paid in advance is not earned, unless the voyage for which it is stipulated to be paid is fully performed; and the owner of the vessel is liable to a claim for reimbursement in favor of the shipper, if for any fault not imputable to the latter the contract of affreightment is not fulfilled. This rule may be varied or annulled by an express agreement in the charter-party or bill of lading, by which it is provided that money paid in advance on account of the freight shall be deemed to be absolutely due to the owner at the time of its prepayment, and not in any degree dependent on the contingency of the performance of the contemplated voyage, and the entire fulfilment of the contract of carriage. But as such a stipulation is intended to control the usual rule of law applicable to such contracts, and to substitute in its place a positive agreement of the parties, it is necessary to express it in terms so clear and unambiguous as to leave no doubt that such was the intention in framing the contract of affreightment. Otherwise, the general rule of law must prevail." The doctrine thus stated, and which was held upon full consideration in Minturn *v.* Warren Ins. Co., 2 Allen, 86, renders any discussion of the general proposition unnecessary, that a payment made in advance for freight may be recovered back, if the

freight is not earned, in the absence of any express agreement to the contrary.

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Judgment for the plaintiff.

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b. *Lien.*

SKINNER *v.* UPSHAW.

King's Bench. 2 Ld. Ray. 752. 1702.

The plaintiff brought an action of trover against the defendant, being a common carrier, for goods delivered to him to carry, etc. Upon not guilty pleaded, the defendant gave in evidence, that he offered to deliver the goods to the plaintiff, if he would pay him his hire; but that the plaintiff refused, etc., and therefore he retained them. And it was ruled by Holt, Chief Justice at Guildhall (the case being tried before him there), May 12, 1 Ann. Reg. 1702, that a carrier may retain the goods for his hire; and upon direction the defendant had a verdict given for him.

PHILLIPS *v.* RODIE.

King's Bench. 15 East, 547. 1812.

In trover for 179 bales of cotton, which was tried at Lancaster, before Wood, B., a verdict was found for the plaintiffs for £1,955 18*s.* 2*d.*, subject to the opinion of the court on the following case.

On the 15th of October, 1810, White, the bankrupt, entered into a charter-party with the defendants for the hire of the ship "Flora," of which the defendants are owners, on a voyage from Liverpool to Surinam and back again.

[By the charter-party, White was to pay for the return cargo at specified rates of freight for certain-named kinds of goods, and if the vessel should not be fully laden with the return cargo, he was to pay for so much in addition as the vessel would have carried; and if he should not furnish any return cargo, then he should pay full freight for the vessel as if she should have been fully laden. He was also to pay a certain rate of demurrage for each day's delay beyond a stipulated time for putting on board the cargo. There was delay by White's agent at Surinam in furnishing a cargo, and then the vessel was only partially loaded. White having become

insolvent before the return of the vessel to Liverpool, the plaintiffs, his assignees, tendered the freight and charges as to the goods shipped, but defendant demanded an additional sum for demurrage and for freight on the deficiency of the cargo, usually called dead freight, and detained the goods under claim of a lien therefor. Verdict was for plaintiffs for the agreed value of the goods detained, less the charges thereon. If plaintiffs were found not to be entitled to a verdict a nonsuit was to be entered.]

Littledale, for the plaintiffs, contended that the defendants had no lien either for the demurrage or dead freight; the claim of a lien on the cargo for demurrage was neither warranted by the charter-party, by any usage of trade found, or by any legal precedent. But even if such a lien could exist, it would have been waived in this case by the defendants having taken a bill payable at a future day for it. Next, there can be no lien for dead freight, as it is called, which is a mere nonentity, the only satisfaction for which rests on the covenant, which is personal. A lien is properly a right to detain specific property for something due in respect of it until payment be made; such as artificers have for the value of their work on the goods of another; carriers for the carriage of goods; though liens may exist in other cases by express contract, or implication. So owners of ships have a lien for freight: that is, for the actual carriage of the goods.[1] If the freight had been agreed to be paid at so much a ton on the ship's measurement, the defendants would have had a lien for it on the goods actually shipped, whether more or less; but here it was made payable according to different rates upon specific goods; and if they could detain the goods on board for freight not earned, it would exclude the freighters from pleading that they were ready to have loaded a complete cargo but for the captain, who refused to take it in. Upon this contract for different rates of freight on different goods the amount is uncertain, where the freight was not in fact earned; so that the freighters could not tell for how much they were to give their bill; and it must be equally doubtful by what rule the compensation is to be made; it rests therefore in damages, to be assessed with reference to the usage of trade.[2] Perhaps it might be too much to say that there was no lien in this case upon the goods unshipped at the docks: the unloading is an act going on from day to day; and perhaps White might not be bound to give the bill till the last package was ready to be delivered.

Richardson, *contra*, as to the last observation, said that the master might continue his lien by landing the goods in the docks at L. in his own name, and might make an entry in his own name in the dock-books, to continue his lien; and therefore the cargo being several days in landing could make no difference in this case. But

[1] Rosse, p. 1, and Blaker v. Dixon, 2 Bos. & Pull. 321, were cited.

[2] Hall v. Pullin, 3 Taunt. 220, and Abbot on Merch. Ship. 274.

the sole question intended to be made was upon the fair meaning of the charter-party, which goes further than the common form, in stipulating that if the vessel should not be fully laden with the return cargo, White should not only pay freight for the goods on board, but for so much in addition as the vessel would have carried. And it also provides that in case of there being no cargo put on board, he shall still pay full freight, as if she had been fully laden with goods of the above description. [Le Blanc, J. Must not the amount depend upon the description of the cargo?] That is regulated by usage, and the proportions are understood by the parties. The payment in any case is reserved to be made as freight, and the contract of the parties must be construed with reference to the state of things if the ship had been fully laden, so far as there is any subject-matter for the accustomed lien to act upon. [Lord Ellenborough, C. J. If any lien were established in this case, it must be to the extent which the arbitrators should award; for the amount must be a subject of reference;[1] and that would be a novel species of lien at common law.] It may be calculated by usage, as easily as the value of work in ordinary cases. [Lord Ellenborough, C. J. We must then assume that there existed a known usage in these cases, and that both parties were cognizant of it at the time when the contract was entered into, and contracted with reference to it. Does not a lien for freight mean for goods actually carried? but this is a lien upon air; for goods not carried. Bayley, J. What terms are there in the charter-party from whence it can be collected that the freighters were bound to carry such a proportion of each commodity; for example, what was there to oblige them to load coffee?] Usage regulates the proportions; and as there is no doubt that an action of covenant would lie to recover damages for the breach in not loading fully, the amount must be capable of reasonable certainty. If the goods were not loaded by the master's fault, that would be an answer to the demand; and whatever would be a defence to an action on the covenant would take away the lien; and the plaintiffs might have discharged the lien by tendering a sum sufficient to discharge the demand.

Lord Ellenborough, C. J. It is impossible in this case, without the intervention of a jury or an arbitrator, to settle what is the sum to be tendered: it would be taking a leap in the dark. Where there is no custom to regulate the proportions and the amount, the case must necessarily rest in damages. What is a lien for freight but a right to detain the goods on board until the freight which has been actually earned upon them, which is always capable of being calculated and ascertained, has been paid, and where the owner of the goods knows what he is to tender? But here the claim to retain is for the amount of damages unascertained, which the parties are entitled to recover for the non-completion of the cargo, commonly

[1] See a case of this sort, Harrison *v.* Wright, 13 East, 343.

called dead freight: but it is that term, freight, which has misled the defendants; for it is not freight, but an unliquidated compensation for the loss of freight, recoverable in the absence and place of freight. The covenant is in effect to load the vessel fully, or if not, to indemnify the shipowner by paying so much in addition as the vessel would have carried: the covenant, in the event of no loading, is to pay full freight for the vessel (not for goods not loaded), as if she had been loaded with goods of the description before mentioned; that must depend on the tonnage of the vessel. In order to found the argument, the covenant should have been to pay full freight as if the goods had been actually loaded on board, and that the master should have the same lien upon the goods actually on board as if the ship had been fully laden with all the goods covenanted to be loaded. But if we were to put this construction upon the contract as it now stands, it would be making a new contract for the parties. There is no pretence or color for the lien now claimed; it is a lien to attach upon a nonentity: the plaintiffs' action of trover, therefore, is not met by any defence.

Grose, J. A lien must attach upon some certain thing; and here there is nothing for it to attach upon.

Postea to the plaintiffs.

CHICAGO & NORTHWESTERN R. CO. *v.* JENKINS.

103 Ill. 588. 1882.

Mr. Justice Walker. . . . . .

It is claimed that appellant had the right to hold the property until its charges for demurrage were paid, — that they were a lien on the property, and it was not required to make delivery until they were paid. The claim is based on rules and regulations adopted and published by the company. It will be conceded that all liens are created by law, or by contract of the parties. Where the law gives no lien, neither party can create it without the consent or agreement of the other. Noyes & Messenger were therefore not bound by these rules unless they assented to them when the contract for shipping the goods was entered into by the parties, and such a contract is not claimed. But it is insisted that as the rules were public, and generally understood, it must be presumed they assented. For the purpose of creating such a lien on property the law will never indulge such presumptions. There is no evidence or agreement that either the consignor or consignee ever had notice or knew of such regulations. But even if they had, unless they agreed to be bound by them the rule could create no such lien.

We held, in the case of Illinois Central R. R. Co. *v.* Alexander, 20 Ill. 23, that railroad companies, when they had carried goods to their destination, if not removed by the consignee, might store them in their warehouses, and thus terminate their liability as common carriers, and thereby assume the relation and liabilities of warehousemen. To the same effect is the case of Richards *v.* Michigan Southern and Northern Indiana R. R. Co., id. 404; and in the case of Porter *v.* Chicago and Rock Island R. R. Co., id. 407, it was held it was their duty to do so, or remain liable for loss as common carriers. It was held in the former of these cases, that when stored, and they had placed the goods in their warehouse, they were entitled to charge the customary price for such services, and on such charges being paid or tendered, and a refusal by the company to deliver on demand, it became liable for a conversion.

The right to demurrage, if it exists as a legal right, is confined to the maritime law, and only exists as to carriers by sea-going vessels. But it is believed to exist alone by force of contract. All such contracts of affreightment contain an agreement for demurrage in case of delay beyond the period allowed by the agreement or the custom of the port allowed the consignee to receive and remove the goods. But the mode of doing business by the two kinds of carriers is essentially different. Railroad companies have warehouses in which to store freights. Owners of vessels have none. Railroads discharge cargoes carried by them. Carriers by ship do not, but it is done by the consignee. The masters of vessels provide in the contract for demurrage, while railroads do not, and it is seen these essential differences are, under the rules of the maritime law, wholly inapplicable to railroad carriers.

Perceiving no error in the record, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

POTTS *v.* NEW YORK & NEW ENGLAND R. CO.

131 Mass. 455. 1881.

Tort for the conversion of a quantity of coal. Answer, a general denial. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, upon an agreed statement of facts in substance as follows:—

The plaintiff, a coal merchant, sold to a firm in Southbridge, in this commonwealth, a large quantity of coal, and shipped 205 tons thereof by a schooner to Norwich, Connecticut, to be thence transported by the defendant over its railroad to the consignees at Southbridge. The defendant received the coal at Norwich, paying the water freight to discharge the schooner's lien, amounting to $205,

and then carried the coal to Southbridge, and delivered to the consignees all but 119 tons thereof, no part of the advances for water freight nor the defendant's freight being paid. On the arrival at Southbridge of the 119 tons, which is the coal in controversy, the consignees having failed, the plaintiff duly stopped it *in transitu*, and demanded it of the defendant. The defendant refused to deliver it, claiming a lien on it for the entire amount of the water freight on the whole cargo paid by the defendant, and for the whole of the defendant's freight on the cargo, amounting in all to $513. The plaintiff tendered to the defendant $297, which was enough to cover the water freight and the defendant's freight on the coal in question. The value of the coal in controversy was $696.

If the defendant had no right to hold the coal as against the plaintiff for the advances and freight on the whole cargo, judgment was to be entered for the plaintiff for $398, with interest from the date of the writ; otherwise, judgment for the defendant.

Gray, C. J. A carrier of goods consigned to one person under one contract has a lien upon the whole for the lawful freight and charges on every part, and a delivery of part of the goods to the consignees does not discharge or waive that lien upon the rest without proof of an intention so to do. Sodergren *v.* Flight, cited in 6 East, 622; Abbott on Shipping (7th ed.), 377; Lane *v.* Old Colony Railroad, 14 Gray, 143; New Haven & Northampton Co. *v.* Campbell, 128 Mass. 104. And when the consignor delivers goods to one carrier to be carried over his route, and thence over the route of another carrier, he makes the first carrier his forwarding agent; and the second carrier has a lien, not only for the freight over his own part of the route, but also for any freight on the goods paid by him to the first carrier. Briggs *v.* Boston & Lowell Railroad, 6 Allen, 246, 250.

The right of stoppage *in transitu* is an equitable extension, recognized by the courts of common law, of the seller's lien for the price of goods of which the buyer has acquired the property, but not the possession. Bloxam *v.* Sanders, 4 B. & C. 941, 948, 949, and 7 D. & R. 396, 405, 406; Rowley *v.* Bigelow, 12 Pick. 307, 313. This right is indeed paramount to any lien, created by usage or by agreement between the carrier and the consignee, for a general balance of account. Oppenheim *v.* Russell, 3 B. & P. 42; Jackson *v.* Nichol, 5 Bing. N. C. 508, 518, and 7 Scott, 577, 591. See also Butler *v.* Woolcott, 2 N. R. 64; Sears *v.* Wills, 4 Allen, 212, 216. But the common-law lien of a carrier upon a particular consignment of goods arises from the act of the consignor himself in delivering the goods to be carried; and no authority has been cited, and no reason offered, to support the position that this lien of the carrier upon the whole of the same consignment is not as valid against the consignor as against the consignee.

Judgment for the defendant.

CAMPBELL *v.* CONNER.

70 N. Y. 424. 1877.

APPEAL from judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of plaintiff, entered upon a verdict.

This action was brought by plaintiff as owner of the bark "John Campbell," against defendant, sheriff of the city and county of New York, to recover damages for unlawfully taking and removing from said vessel a quantity of flour, and for detention of the vessel. The sheriff sought to justify by virtue of certain warrants of attachment against the shipper of the flour to whom bills of lading had been delivered. The flour was shipped to Hamburgh. At the time of the seizure the attention of the sheriff was called by plaintiff's counsel to the fact that no bond of indemnity was given, as required by the statute, chap. 242, Laws of 1841, and he was forbidden to take the goods; he, however, persisted in so doing, detained the vessel, unloaded and carried away the flour. Upon the vessel being released, the master procured a quantity of rosin to make up the cargo, and employed a stevedore to restow the cargo.

The seizure of the vessel and flour was made April 30, 1874; at that time the vessel was ready and about to go to sea, and on May 10, 1874, as soon as able after the flour was removed, she left port.

The bills of lading, which had been issued for the flour, were outstanding at the time of trial.

On the trial, plaintiff's counsel stated that, unless a satisfactory bond of indemnity was given to indemnify plaintiff from any liability on the bills of lading, he would require to be indemnified, by a verdict, for the value of the flour, and requested defendant to furnish such bond, which his counsel declined to do.

The court directed a verdict for $9,207.57, composed of the following items: —

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Further facts appear in the opinion.

CHURCH, Ch. J. The principal question in this case is, whether the value of the property seized and removed from the ship was properly included as an item of damages, which the plaintiff was entitled to recover. The goods had been shipped, bills of lading issued, and were outstanding, and the vessel was ready to sail when the attachments were levied and the goods taken. The freight and charges were not paid, nor was any bond of indemnity given. The sheriff refused to give any bond at the time or since. It did not appear on the trial that the plaintiff had paid but a small amount, by reason of the bills of lading, although they were still outstanding.

It is well settled at common law that a shipper cannot insist upon having his goods relanded and delivered to him at the port of outfit, without paying the freight and indemnifying the master against the consequences of any bill of lading signed by him. Abbott on Shipping, 531, 595 [4th ed.]; Bartlett *v.* Carnley, 6 Duer, 195.

An assignee of the bills of lading for value would be entitled to the property, and the master or owner would be estopped from denying that he had the goods. 28 L. & Eq. R. 216. Neither creditors nor the sheriff can acquire, through attachment or other process, any better right to the property than the shipper had. 6 Duer, *supra*.

The Act of 1841, chapter 242, carries out, to some extent, the common-law rule by making it lawful for the master to proceed on the voyage, notwithstanding the issuing of any attachment unless a bond is given conditioned to pay all expenses, damages, and charges which may be incurred, or to which they may be subjected for unloading the goods, and for all necessary detention.

Both the common law and the statute recognize the right of the master or shipowner to a lien for freight, expenses, and charges, and for his liability upon outstanding bills of lading, and they are necessarily co-extensive with the value of the goods. It follows, I think, that neither the owner of the goods nor any creditor can take the goods, without first giving the indemnity which the common-law rule and the statute prescribe.

An attachment cannot be levied. The sheriff is commanded to levy the goods of the defendant in the action. The goods in question were not his property. A lien, in the nature of a special property, existed in favor of the plaintiff to their full value. Neither the shipper nor sheriff had any more right to seize the goods, without furnishing indemnity, than any stranger. The plaintiff was entitled to hold the goods as his security; and, if taken by a stranger, it would have been a trespass, for which the plaintiff could recover their value, and hold the proceeds in lieu of the goods. The contention of the defendant is that the plaintiff has not been damnified. He insists that the rights of parties are the same as if the action was upon the bond, if one had been given. In this, I think, he is in error. The condition precedent to his right to interfere with the property was the indemnity which the law requires, and, without furnishing this indemnity, he had no right and was a trespasser, unless, perhaps, he could show bad faith on the part of the carrier. The plaintiff held the property as his security, and, when unlawfully taken, he is entitled to recover its value, and hold the amount for the same purpose and to the same extent as he held the property. If he escapes liability upon the bills of lading, the equitable powers of the court, upon motion or by action, can be invoked to award restitution to the owner of his creditors, but, until this is ascertained, he has a right to retain the property or its value. Any other

rule would destroy the protection which the law affords. If the plaintiff could not recover the value of the goods in this action, he might be remediless, if his liability upon the bills of lading should afterward be enforced against him.

I assume that the bond required, at common law and by statute, is an indemnity only. If the defendant had complied with the law and furnished the bond, he would have been in a condition to invoke the rule which he claims, in respect to damages, but this he has deliberately refused to do. He was, therefore, a wrong-doer in taking the property, and the legal consequences follow.

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The judgment must be affirmed.

STEAMBOAT VIRGINIA *v.* KRAFT.

25 Mo. 76. 1857.

One Whiting, acting as a forwarding merchant in New Orleans, shipped for St. Louis, per the steamboat "Virginia," five cases of scythes. When said goods were received on board of said steamboat, the said Whiting demanded, and the clerk of said steamboat paid to said Whiting the sum of $153.42. Said sum was entered as "charges" in the bill of lading. Of said sum of $153.42, a portion — $147.92 — formed no part of the charges paid by or due Whiting on account of the said merchandise shipped on the "Virginia;" it was a charge made by Whiting on account of the former advances, travelling expenses, lawyer's charges for collecting, etc. The merchandise shipped by said Whiting as forwarding agent was delivered to E. F. Kraft & Co., the owners thereof, at St. Louis, who refused to pay to said steamboat the said item of $147.92, alleging that they were not liable therefor, but admitting their liability to the extent of the remaining advances. This suit was brought in behalf of said steamboat to recover said sum of $153.42.

The jury returned a verdict for plaintiff for the whole amount sued for.

Scott, Judge. In the case of White *v.* Vann, 6 Hump. 73, the court said it was "proved by several enlightened merchants and well-informed owners of steamboats, that it is the long and well-established custom and usage of trade, not only on the Tennessee River, but throughout the United States, for freighters of goods to advance to the forwarding agents the existing charges upon them, which the consignees and owners are liable to refund; that this usage is indispensable to the successful prosecution of commercial operations, and of great and mutual advantage to all parties." We

have copied the above extract as showing the usage, because upon examination we have not been enabled to find much, if anything, in relation to it. The advantages resulting from this usage are so obvious that it must commend itself to every one; and we should regret to see it a stranger to our courts. But advantageous as this usage is shown to be, we do not know, nor can we conceive anything that would more effectually render it odious than such an extension of it as would make it cover advances for claims or demands on the owner or consignees wholly foreign to and disconnected with any cost or charge for transportation. If this were tolerated, not only the forwarding agent, but every one who would collude with him, might obtain payment of demands, whose justice the owners or consignees refused to recognize. It would be the introduction of a novel mode for the collection of debts where payment had been denied on the ground of their invalidity, and a means of compelling the owner to submit to unjust exactions or to refuse him his goods.

As the debt paid by the plaintiff through her agent was in nowise incurred by, or in any way connected with, the transportation of the merchandise, she could not by such voluntary payment, unsupported by any usage, make herself a creditor of the defendant. Nor can the officers of the plaintiff, by any custom or usage, protect her from the consequences of their neglect in not ascertaining whether their advances were the costs of transportation. Would they advance any amount, however enormous, and expect to save her from loss by a usage which did not require them to ascertain the validity of the charges? A custom to encourage negligence at the expense of others would scarcely be tolerated by the law. Being familiar in the business of transporting merchandise, if the items of the charges were produced and examined, the agent could see at once whether they were usual and proper.

The principle that, where one of two innocent persons must suffer by the act of a third, he should bear the loss who has placed it in the power of the third person to do the injury, has no application here. The plaintiff is not an innocent party. Her agents were guilty of gross negligence in not informing themselves of the nature of the charges for which they made an advance. There is no pretence in the circumstances of the case to warrant the instruction to the effect that the defendants, by receiving the goods, acknowledged the justice of the charges, and were liable to pay them, unless the plaintiff, when she advanced them through her agent, knew that they were not the ordinary and usual charges incurred in the transportation and shipment of goods.

As the charge was illegal and unjust; as there was no evidence that the defendants were aware of its nature when they received the goods; as they objected to it so soon as it was known; and as they could not contemplate that an improper charge would be made against them, — there is no foundation for the presumption that they acqui-

esced in or acknowledged the justice of the plaintiff's demand. The defendants, upon tendering the legal advances, would have been entitled to the possession of their goods, and might by an action have compelled their delivery. As they have them lawfully without suit, there is no reason why they should be placed in a worse situation than if they had obtained them by suit. The other judges concurring, the judgment will be reversed, and the cause remanded.

WELLS *v.* THOMAS.

27 Mo. 17. 1858.

THIS was an action for the possession of an omnibus. The cause was tried by the court without a jury upon an agreed statement of the facts, of which the following is the substance: Plaintiffs purchased the omnibus mentioned in the petition, of the value of five hundred dollars, of John Stephenson, in New York, and instructed him to ship it to them at St. Louis, Missouri. Thereupon said Stephenson, for the plaintiffs, on the 24th of September, 1855, made a contract with the New York Central Railroad Company (being a railroad running from New York to Buffalo, in the State of New York) to deliver said omnibus to the plaintiffs at St. Louis for the sum of $49.33. The bill of lading (which was set forth in the agreed statement) was forwarded to plaintiffs at St. Louis. Stephenson delivered the omnibus to the New York Central Railroad Company to be transported to St. Louis, by which it was carried in the usual mode and time to Buffalo, and there delivered to the Michigan Central Railroad Company, which transported the same to Joliet. At Joliet the omnibus was delivered to the Chicago, Alton, and St. Louis Railroad Company to be transported to St. Louis. The Chicago, Alton, and St. Louis Railroad Company received said omnibus in due course of business, without any notice of any special contract for its transportation, and paid to the Michigan Central Railroad Company the sum of seventy-two dollars, the amount of their bill for the freight on the omnibus from Buffalo to Joliet, and the charges they had paid on receiving the same. It is customary for one railroad company, when receiving goods from another railroad company, to be carried forward by the former, to pay the freight and charges upon said goods and property up to the point where they are so received. Said omnibus arrived in St. Louis, and was in the possession of defendant, the agent of the Chicago, Alton, and St. Louis Railroad Company. The defendant notified plaintiffs of the arrival of the omnibus, and requested them to call and pay freight and charges, amounting to $102.40. The plaintiffs

offered to pay $49.33, and demanded of defendant the omnibus. The defendant refused to deliver it until the freight and charges advanced to the Michigan Central Railroad Company and the freight from Joliet to St. Louis, the latter amounting at the customary rates to $30.37, should be paid. The plaintiffs refused to pay more than the amount tendered. There was nothing in the amount or character of the charges paid by the Chicago, Alton, and St. Louis Railroad Company to the Michigan Central Railroad Company to excite any suspicion that the charges were unreasonable.

The court decided the cause for the plaintiffs. A motion for a review was made and overruled.

NAPTON, Judge. Upon the case agreed, our opinion is that the defendant was entitled to judgment.

We do not see how the contract made with the New York company is to bind the Alton and St. Louis Railroad Company without showing some privity between these corporations or a knowledge of the contract on the part of the Alton and St. Louis company. No such privity is shown, nor is it pretended that the companies at this end of the route were apprised of any special agreement about the freight. The cases of Fitch & Gilbert *v.* Newberry, 1 Dougl. Mich., and Robinson *v.* Baker, 5 Cush. 137 [**480**], are not applicable. The Illinois Railroad Company received the omnibus in the usual course of trade from the Michigan company, and paid the freight due at Joliet, as the Michigan company had paid what was due at Buffalo. The omnibus was transported by the route desired and directed by the plaintiffs and indicated by the bills of lading. These transportation companies received the omnibus from the New York Railroad Company, who were authorized to give it this destination. It is not the case of goods shipped on a different line from that directed by the owner or sent to points not authorized.

It is manifest that if we hold the carriers at this end of the route not entitled to their freight because of a contract made by the carriers at the eastern terminus, of which they had no knowledge, great injustice is done to the carriers here, and still greater injury inflicted upon consignees. The carriers must protect themselves by requiring freight in advance, contrary to what has been found in this case to be the established custom.

What may be the proper construction of the bill of lading forwarded to the plaintiffs here by the New York Central Railroad Company is not material to be determined. If the meaning of it be as intended by the plaintiffs, the New York company is of course responsible; but this is no reason why defendants should lose their lien. If any arrangement or understanding existed among these corporations relative to through transportation, the rule would be different.

The judgment is reversed.

BRIGGS *v.* BOSTON & LOWELL R. CO.

6 Allen (Mass.), 246. 1863.

Tort for the conversion of sixty-seven barrels of flour Upon agreed facts, which are stated in the opinion, judgment was rendered in the Superior Court for the plaintiff, for the amount received by the defendants upon the sale of the flour by them, deducting the sum claimed by them as the amount for which they had a lien on the flour, and the expenses of the sale; and the defendants appealed to this court.

Merrick, J. The plaintiff, who resides at Racine, in the State of Wisconsin, delivered the flour, the value of which he seeks to recover in this action, to the Racine and Mississippi Railroad Company, taking from their agents a receipt, in which they agreed to forward and deliver it to Franklin E. Foster, at Williamstown, in this State. By mistake of the agents of that company, the flour was erroneously directed or billed to Wilmington, where there is a freight station on the road of the defendants. It was carried by the Racine and Mississippi Company over their road, and at its eastern termination delivered to the carriers next in succession in the line and route from Racine to Wilmington. And it was thus transported by the successive carriers in that line and route in their vessels and cars respectively, according to the bills and directions under which it was forwarded from Racine, until it arrived in due time at Groton, the point of the commencement of the road of the defendants. And it was there received by them, they paying the freight earned by all the preceding carriers, and carried to Wilmington, where it was duly deposited in their freight depot. But Franklin E. Foster, to whom it was directed, did not reside or have any place of business at Wilmington, and the defendants were unable to find there any consignee who could be notified of its arrival, or to whom it could be delivered. The defendants' agents immediately instituted a diligent inquiry, but they could not ascertain where the consignee or any other person entitled to have possession of the flour was to be found, or could be notified. At the time of its arrival at Wilmington it was beginning to become sour, and would soon have greatly deteriorated in value. The defendants kept it on hand in store for about two months; and at the expiration of that time, still unable to find either the owner or the consignee, and it being out of their power to procure a warehouse in which they could store it for a longer time, they caused it to be sold at public auction, and received the proceeds of the sale, which they have since retained in their possession.

Upon these facts, the plaintiff in the first place contends that as Williamstown was the place of destination of the flour under the directions which he gave to the Racine and Mississippi Railroad Company, and according to their agreement in the receipt given for it by them to him the defendants had no right to receive the flour at Groton, and were guilty of the unlawful conversion of it to their own use by transporting it thence to Wilmington; although in such reception and transportation of it over their road they acted in good faith, and strictly in conformity to the bills and directions which were made and given by the agents of the Racine and Mississippi Company, and by which it was regularly accompanied over each and all the lines and routes of the successive carriers.

The same person may be, and often is, not only a common carrier but also the forwarding agent of the owner of the goods to be transported. Story on Bailm. §§ 502, 537. He must necessarily act in the latter capacity whenever he receives goods which are to be forwarded not only on his own line, but to some distant point beyond it on the line of the next carrier, or on that of the last of several successive carriers on the regular and usual route and course of transportation, to which they are to be carried and delivered to the consignee. The owner generally does not and cannot always accompany them and give his personal directions to each one of the successive carriers. He therefore necessarily, in his own absence, devolves upon the carrier to whom he delivers the goods the duty, and invests him with authority to give the requisite and proper directions to each successive carrier to whom, in due course of transportation, they shall be passed over for the purpose of being forwarded to the place of their ultimate destination. Otherwise they would never reach that place. For the first carrier can only transport the goods over his own portion of the line; and if he is not authorized to give the carrier with whose route his own connects directions in reference to the further transportation, they must stop at that point; for although, in general, every carrier is bound to accept and forward all goods which are brought and tendered to him, yet he is not so bound unless he is duly and seasonably informed and advised of the place to which they are to be transported. Story on Bailm. § 532; Judson *v.* Western Railroad, 4 Allen, 520 [**185**].

Hence it results by inevitable implication that when an owner of goods delivers them to a carrier to be transported over his route, and thence over the route of a succeeding carrier, or the routes of several successive carriers, he makes and constitutes the persons to whom he delivers them his forwarding agents, for whose acts in the execution of that agency he is himself responsible. And therefore if the several successive carriers carry the goods according to the directions which are given by the forwarding agents, they act under the authority of the owner, and cannot in any sense be considered as wrong-doers, although they are carried to a place to which he did

not intend that they should be sent. And in such case the last carrier will be entitled to a lien upon the goods, not only for the freight earned by him on his own part of the route, but also for all the freight which has been accumulating from the commencement of the carriage until he receives them, which, according to a very convenient custom, which is now fully recognized and established as a proper and legal proceeding, he has paid to the preceding carriers. Stevens *v.* Boston & Worcester Railroad, 8 Gray, 266.

Applying these rules and principles to the facts developed in the present case, the conclusion is plain and inevitable. It is conceded by the plaintiff, and agreed by the parties, that the flour was carried by the Racine and Mississippi Railroad Company over their road, and was then delivered to the carrier with whose route their own connected, and was thence transported in strict compliance with and exactly according to the directions given by them and contained in the bills which they forwarded with and caused to accompany the flour over the whole route from Racine to Wilmington, by the several successive carriers, and among others by the defendants. The Racine and Mississippi Company were the duly constituted forwarding agents of the plaintiff; and as the defendants acted under their authority, they rightfully received the flour at Groton and carried it to Wilmington. And having under that authority paid all the freight which had accumulated in the whole course of the conveyance, including that which had been charged by the forwarding agent, up to the time when they received the flour, they were, as soon as it was conveyed to and deposited in their own freight house, entitled to a lien thereon for the entire freight thus paid and earned. And they cannot, either by the transportation of it under such circumstances over their own road, or by the detention thereof for the purpose of enforcing their lien upon it, be held to have unlawfully converted it to their own use.

This conclusion does not at all conflict with the decision in the case of Robinson *v.* Baker, 5 Cush. 137 [**480**], upon which the plaintiff, in support of his position, chiefly relies. For there is an essential difference between the facts in the present and those which appeared in that case. There it was shown that the plaintiff, the owner of a parcel of flour, delivered it at Black Rock, on board of one of their canal boats, to the Old Clinton Line Company, who gave for it bills of lading in duplicate, wherein they undertook and agreed to transport it to Albany, and there deliver it to Witt, the agent of the Western Railroad. The plaintiff sent one of these bills of lading to Witt and the other to the consignee at Boston, thus reserving to himself the right and assuming the responsibility of giving to Witt the directions under which he was to act. The service which the Old Clinton Line Company was to render was exclusively in their capacity as common carriers. They had only to carry the flour to Albany and there deliver it to Witt. They had no other duty to

perform; no right to exercise any control over it for any other purpose. They were not, therefore, the forwarding agents of the plaintiff, nor invested by him with any authority to give directions as to further transportation of the flour, or to make any other disposition of it than its delivery to Witt. Yet upon its arrival in Albany, in consequence of the inability of Witt immediately to receive and take charge of it, the agents of the Clinton Line Company, without right and in violation of their duty, shipped the flour to the city of New York, and from there to Boston in the schooner "Lady Suffolk," whose owners claimed a right to detain it under lien upon it for the freight. But the court, upon the general principle that if a carrier, though innocently, receives goods from a wrongdoer without the consent of the owner, express or implied, he cannot detain them against the true owners until the freight or carriage is paid, determined that they had no lien upon the flour, and that their claim to that effect could not be sustained. But if they had been the forwarding agents of the owner he would have been responsible for their acts, and his consent to the diversion of the property from its intended route of transportation would have resulted by implication from their directions, and the respective carriers would then have become entitled to hold it under a lien to secure payment of the freight.

When the flour had been carried over their road to Wilmington and deposited at that place in their warehouse, the defendants had, as has been shown above, a lien upon it for all the freight which had been earned in its transportation from Racine. But this gave them only a right to detain it until they were paid; not to sell it to obtain the remuneration to which they were entitled. In the case of Lickbarrow *v.* Mason, 6 East, 21, it is said by the court that an owner may sell or dispose of his property as he pleases; but he who has a lien only on goods has no right to do so; he can only detain them until payment of the sum for which they are chargeable. And the rule which is now well established, that a party having a lien only, without a power of sale superadded by special agreement, cannot lawfully sell the chattel for his reimbursement, is as applicable to carriers as it is to all other persons having the like claim upon property in their possession. Jones *v.* Pearle, 1 Stra. 556; 2 Kent Com. (6th ed.), 642; Doane *v.* Russell, 3 Gray, 382. It is in distinct recognition of this principle that the legislature have provided that when the owner or consignee of fresh meat, and of certain other enumerated articles liable soon to perish for want of care, shall not pay for the transportation and take them away, common carriers who have a lien thereon for the freight may sell the same without any delay, and hold the proceeds, subject to their own lawful charges, for the use of the owner. And such also is the provision in relation to trunks, parcels, and passengers' effects left unclaimed at any passenger station of a railroad company for a period of six

months after arrival and deposit therein. Gen. Sts. c. 80, §§ 1, 2, 5. This enumeration of particular cases, in which the right to sell and dispose of certain goods and chattels transported is conferred upon common carriers, operates, according to a familiar rule of law, as a denial or exclusion of their right in all other instances.

None of the provisions of the statute referred to extends to the case of flour transported in barrels as an article of merchandise. And therefore the defendants had no authority under the statute and no right at law to sell the flour which belonged to the plaintiff, although they had a valid and subsisting lien upon it, and were unable to find, after diligent inquiry, where the person to whom it ought to be delivered resided or had his place of business, and there was danger of its becoming worthless by longer detention of it in their warehouse. And consequently the sale which they made was an unlawful conversion of it to their own use which renders them liable in an action of tort to the owner, for its value, or rather for the value of all the right and interest which he at that time had in it, which is the merchantable value less the amount of the lien upon it. The plaintiff, therefore, may maintain this action, and is entitled to recover as damages the balance left after deducting from the sum which was the fair merchantable value of the flour at the time of the conversion the amount for which, upon the principles before stated, they had a lien upon it, with interest from the time of demand, or the date of the writ. And as the sale was unlawful, the expenses incurred in making it cannot be proved for the purpose of diminishing the damages which the plaintiff ought to recover.

Judgment is therefore to be rendered for him. Unless the parties agree upon the amount, the cause must be sent to an assessor, or submitted to a jury if either party requires it, to assess the damages.

ROBERTS *v.* KOEHLER.

30 Fed. R. (U. S. C. C.) 94. 1887.

Deady, J. This action was brought against the defendant, the receiver of the Oregon & California Railway, to recover damages for alleged maltreatment of the plaintiff while travelling on the road between Portland and Ashland, Oregon. The cause was tried with a jury, who gave a verdict for the defendant, and is now before the court on a motion for a new trial. It appeared on the trial that the plaintiff purchased from the defendant a combination ticket from Portland to San Francisco, where he resided, and started on the south-bound Oregon & California train on July 13, 1885; that about 200 miles south of Portland the conductor cut off from said com-

limation ticket and took up the coupon, entitling the plaintiff to transportation on the railway between Portland and Ashland, a distance of about 300 miles, and gave him his private check for future identification; that at Grant's Pass, a station some miles south of Roseburg, the plaintiff was left behind, and a large leather valise belonging to him was carried on the train to Ashland. The next passenger train going south passed Grant's Pass in the evening of July 14th, and the plaintiff got on the same, when the conductor, in obedience to the rules of the company, demanded his fare to Ashland, $1.79, which the plaintiff refused to pay, alleging that he had paid his fare once, and had been left behind by the misconduct of the conductor on the train of the day previous; to which the conductor replied that he would give him a receipt for the payment, and, if his statement proved correct, the money would be refunded to him. The plaintiff still refused to pay, and suggested to the conductor that he might put him off the car, to which the latter replied that he would hold his valise for the fare. When the train arrived at Ashland, the plaintiff attempted to take his valise out of the office where it had been deposited the day before, which the conductor resisted, and, with the aid of a brakeman, finally prevented.

The plaintiff in his testimony attributed his being left at Grant's Pass to the misconduct of the conductor in starting the train without warning, and without waiting the usual time. But on the whole evidence it was so manifest that his testimony was grossly and wilfully false in this respect, and that he was left in consequence of his own wilfulness in leaving the train just as it was about to start, and after he was warned of the fact, and going some distance from the track to get something to eat, that his counsel abandoned the claim for damages on that account before the jury, and only asked a verdict for the alleged mistreatment of the plaintiff at Ashland in the struggle for the possession of the valise.

The court instructed the jury that, if they believed the plaintiff's statement about the affray at Ashland arising out of his attempt to possess himself of the valise, they ought to find a verdict for him, but if they did not believe it, and were satisfied that the conductor used only such force as was necessary and proper to prevent the plaintiff from taking the valise out of the possession of the defendant without first paying the extra fare, they ought to find for the defendant. In this connection the court also instructed the jury that under the circumstances the defendant had a lien on the plaintiff's valise for his fare from Grant's Pass to Ashland on July 14th, and therefore the conductor had a right to retain the possession of the same until such fare was paid. To this latter instruction counsel for the plaintiff then excepted, and now asks for a new trial on account thereof.

A carrier of passengers is responsible, as a common carrier, for the baggage of a passenger, when carried on the same conveyance as

the owner thereof. The transportation of the baggage, and the risk incurred by the carrier, is a part of the service for which the fare is charged. Hollister *v.* Nowlen, 19 Wend. 236 [**173**]; Cole *v.* Goodwin, id. 257; Powell *v.* Myers, 26 Wend. 594 [**342**]; Merrill *v.* Grinnell, 30 N. Y. 609; Burnell *v.* New York Cent. Ry. Co. 45 N. Y. 186; Thomp. Carr. 520, § 8; Story, Bailm. § 499. Correspondingly, a carrier of passengers has a lien on the baggage that a passenger carries with him for pleasure or convenience. Overt Liens, § 142; Thomp. Carr. 524, § 11; Ang. Carr. § 375; 2 Ror. Rys. 1003, § 11. But this lien does not extend to the clothing or other personal furnishings or conveniences of the passenger in his immediate use or actual possession. Ramsden *v.* Boston & A. Ry. Co., 104 Mass. 121.

A ticket for transportation on a railway between certain termini, which is silent as to the time when or within which it may be used, does not authorize the holder to stop over at any point between such termini, and resume his journey thereon on the next or any following train. The contract involved in the sale and purchase of such a ticket is an entire one, and not divisible. It is a contract to carry the passenger through to the point of his destination as one continuous service, and not by piecemeal, to suit his convenience or pleasure. 2 Ror. Rys. 971, § 10; 2 Wood, Ry. Law, § 347; Cleveland, &c. Ry. Co. *v.* Bartram, 11 Ohio St. 457; Drew *v.* Central Pac. Ry. Co., 51 Cal. 425.

Admitting these legal propositions, counsel for the plaintiff insists that the defendant had no lien on the valise in question, and therefore no right to retain it; and in support of this proposition he ingeniously argues that the journey from here to Ashland was divided into two distinct parts, — one from Portland to Grant's Pass on July 13th, for which his fare was paid to Ashland, and on which the valise went through to that point, and one from said pass to Ashland, on which, although no fare was paid, yet no baggage was carried.

Before considering this proposition, it is well to remember that the undertaking of the company to transport this valise, as baggage, was only incidental to the principal undertaking to carry the owner thereof; and, when the latter was performed or discharged, the former was also. Therefore, if the journey in reference to which the defendant undertook to carry the same ended, by the act of the plaintiff, at Grant's Pass, the carriage of the valise from there to Ashland on the same train was an additional service performed for him, for which the defendant was entitled to an additional compensation as the carrier of so much freight, and a lien thereon for the same; for a traveller is not entitled to have his personal baggage carried in consideration of the fare paid by him, unless it is on the same train which carries him. Thomp. Carr. 521, § 8.

But, in my judgment, the transaction must be regarded, for the

purpose of this question, as one journey, in the course of which the plaintiff incurred an additional charge of $1.79 for transportation. In effect, the plaintiff paid his fare to Ashland on the train of July 13th, with the privilege of stopping over at Grant's Pass, and finishing the journey on the next day's train, on the payment of the extra charge of $1.79. He saw proper to avail himself of this privilege, and thereby became indebted to the defendant accordingly. And whether the plaintiff allowed his baggage to be carried through on the first train, or kept it with him, the defendant had a lien on it for all the unpaid charges for transportation which the plaintiff incurred during the journey. There was but one contract for the transportation of the plaintiff, including his baggage, which was modified or altered, in the course of its performance, by his own act or omission.

Suppose there were first and second-class carriages on this road, and on July 13th the plaintiff paid for and took passage in one of the latter for Ashland, but, arriving at Grant's Pass, he got into one of the former, and rode to Ashland, refusing to pay the additional fare when demanded, can there be any doubt that the defendant would have a lien on his baggage for the same, and might, if he had or got possession of it, retain it until such fare was paid? Certainly not. Substantially, this is the parallel of the plaintiff's case. The defendant was clearly in the right in detaining the valise until the fare was paid, and the plaintiff was as clearly in the wrong in attempting to take it without doing so. Indeed, his conduct throughout this transaction looks very much like he was playing a game to involve the defendant in a lawsuit out of which he might make some money.

The motion for a new trial is disallowed.

ROBINSON *v.* BAKER.

5 Cush. (Mass.) 137. 1849.

This was an action of replevin, for six hundred barrels of flour, tried before Dewey, J., and reported by him for the consideration of the whole court. The material facts are as follows: [1] —

The plaintiff, in October, 1847, by his agent, purchased, at Buffalo, 600 barrels of flour, which the agent caused to be put on board a canal boat, to be transferred to Albany. The boat was owned by a company known by the name of the Old Clinton Line, engaged in the business of common carriers between Buffalo and Albany. On receiving the flour, the agent of the company executed

[1] The statement of facts is abridged.

and delivered to plaintiff's agent duplicate bills of lading, by which the company undertook to deliver the flour to the agent of the Western Railroad at East Albany. On the arrival of the flour at Albany, Nov. 5, 1847, the agents of the Old Clinton Line informed the agent of the Western Railroad of the fact, asking him if he would take it off the boat that day. On his refusal to do so, by reason of the fact that other boats were to be first unloaded, the agents of the Old Clinton Line shipped the flour to New York City by the Albany and Canal Line, common carriers engaged in the transportation of merchandise between that city and Albany, requesting that company to ship the flour from New York to Boston for the plaintiff; which was done by the agent of the Albany and Canal Line at New York, placing the flour on board a schooner of which defendant was master, consigned to the agents of the Albany and Canal Line at Boston, with directions to deliver the flour to plaintiff on his paying, or agreeing to pay, the freight by the Old Clinton Line, and also by the Boston and Albany Line, and the freight also from New York to Boston. On the arrival of defendant's vessel at Boston, Nov. 23, 1847, plaintiff demanded the flour which defendant refused to deliver, on the ground that he had a lien thereon for freight.

Fletcher, J. [After stating the facts, the instructions requested, and the instructions given.] As the ruling of the judge, that the defendant, as a carrier, had a lien for his freight, was placed upon grounds wholly independent of any rightful authority in the agents of the Old Clinton Line and the Albany and Canal Line, to divert the goods from the course in which the plaintiff had directed them to be sent, and to forward them by the defendant's vessel, and wholly independent of the plaintiff's consent, express or implied, the simple question raised in the case is whether, if a common carrier honestly and fairly on his part, without any knowledge or suspicion of any wrong, receives goods from a wrongdoer, without the consent of the owner, express or implied, he may detain them against the true owner, until his freight or hire for carriage is paid; or to state the question in other words, whether, if goods are stolen and delivered to a common carrier, who receives them honestly and fairly in entire ignorance of the theft, he can detain them against the true owner until the carriage is paid.

It is certainly remarkable that there is so little to be found in the books of the law, upon a question which would seem likely to be constantly occurring in the ancient and extensive business of the carrier. In the case of York *v.* Grenaugh, 2 Ld. Ray. 866, the decision was, that if a horse is put at the stable of an inn by a guest, the innkeeper has a lien on the animal for his keep, whether the animal is the property of the guest or of some third party from whom it has been fraudulently taken or stolen. In that case, Lord Chief Justice Holt cited the case of an Exeter common carrier, where one stole goods and delivered them to the Exeter carrier, to

be carried to Exeter; the right owner, finding the goods in possession of the carrier, demanded them of him; upon which the carrier refused to deliver them unless he was first paid for the carriage. The owner brought trover, and it was held that the carrier might justify detaining the goods against the right owner for the carriage; for when they were brought to him, he was obliged to receive them and carry them, and therefore, since the law compelled him to carry them, it will give him a remedy for the premium due for the carriage. Powell, J., denied the authority of the case of the Exeter carrier, but concurred in the decision as to the innkeeper. There is no other report of the case of the Exeter carrier to be found. Upon the authority of this statement of the case of the Exeter carrier, the law is laid down in some of the elementary treatises to be, that a carrier, who receives goods from a wrongdoer or thief, may detain them against the true owner until the carriage is paid.

In the case of King *v.* Richards, 6 Whart. 418, the court, in giving an opinion upon another and entirely different and distinct point, incidentally recognized the doctrine of the case of the Exeter carrier. But until within six or seven years there was no direct adjudication upon this question except that referred to in York *v.* Grenaugh of the Exeter carrier. In 1843 there was a direct adjudication upon the question now under consideration in the Supreme Court of Michigan, in the case of Fitch *v.* Newberry, 1 Doug. 1. The circumstances of that case were very similar to those in the present case. There the goods were diverted from the course authorized by the owner, and came to the hands of the carrier without the consent of the owner, express or implied; the carrier, however, was wholly ignorant of that, and supposed they were rightfully delivered to him; and he claimed the right to detain them until paid for the carriage. The owner refused to pay the freight, and brought an action of replevin for the goods. The decision was against the carrier. The general principle settled was, that if a common carrier obtain possession of goods wrongfully or without the consent of the owner, express or implied, and on demand refuse to deliver them to the owner, such owner may bring replevin for the goods or trover for their value. The case appears to have been very fully considered, and the decision is supported by strong reasoning and a very elaborate examination of authorities. A very obvious distinction was supposed to exist between the cases of carriers and innkeepers, though the distinction did not affect the determination of the case.

This decision is supported by the case of Buskirk *v.* Purin, 2 Hall, 561. There property was sold on a condition, which the buyer failed to comply with, and shipped the goods on board the defendant's vessel. On the defendant's refusal to deliver the goods to the owner he brought trover and was allowed to recover the value, although the defendants insisted on the right of lien for the freight.

Thus the case stands upon direct and express authorities. How does it stand upon general principles? In the case of Saltus *v.* Everett, 20 Wend. 267, 275, it is said: "The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his consent, and consequently, that, even the honest purchaser under a defective title cannot hold against the true proprietor." There is no case to be found, or any reason or analogy anywhere suggested, in the books, which would go to show that the real owner was concluded by a bill of lading not given by himself, but by some third person, erroneously or fraudulently. If the owner loses his property, or is robbed of it, or it is sold or pledged without his consent, by one who has only a temporary right to its use by hiring or otherwise, or a qualified possession of it for a specific purpose, as for transportation, or for work to be done upon it, the owner can follow and reclaim it in the possession of any person, however innocent.

Upon this settled and universal principle, that no man's property can be taken from him without his consent, express or implied, the books are full of cases, many of them hard and distressing cases, where honest and innocent persons have purchased goods of others, apparently the owners, and often with strong evidence of ownership, but who yet were not the owners, and the purchasers have been obliged to surrender the goods to the true owners, though wholly without remedy for the money paid. There are other hard and distressing cases of advances made honestly and fairly by auctioneers and commission merchants, upon a pledge of goods by persons apparently having the right to pledge, but who, in fact, had not any such right, and the pledges have been subjected to the loss of them by the claim of the rightful owner. These are hazards to which persons in business are continually exposed by the operation of this universal principle, that a man's property cannot be taken from him without his consent. Why should the carrier be exempt from the operation of this universal principle? Why should not the principle of *caveat emptor* apply to him? The reason, and the only reason, given is, that he is obliged to receive goods to carry, and should therefore have a right to detain the goods for his pay. But he is not bound to receive goods from a wrongdoer. He is bound only to receive goods from one who may rightfully deliver them to him, and he can look to the title, as well as persons in other pursuits and situations in life. Nor is a carrier bound to receive goods, unless the freight or pay for the carriage is first paid to him; and he may, in all cases, secure the payment of the carriage in advance. In the case of King *v.* Richards, 6 Whart. 418, it was decided that a carrier may defend himself from a claim for goods by the person who delivered them to him, on the ground that the bailor was not the true owner, and therefore not entitled to the goods.

The common carrier is responsible for the wrong delivery of goods, though innocently done, upon a forged order. Why should not his obligation to receive goods exempt him from the necessity of determining the right of the person to whom he delivers the goods, as well as from the necessity of determining the right of the person from whom he receives goods? Upon the whole, the court are satisfied that upon the adjudged cases, as well as on general principles, the ruling in this case cannot be sustained, and that if a carrier receives goods, though innocently, from a wrongdoer, without the consent of the owner, express or implied, he cannot detain them against the true owner, until the freight or carriage is paid.

BASSETT *v.* SPOFFORD.

45 N. Y. 387. 1871.

APPEAL from the General Term of the New York Common Pleas.

The action was replevin for four cases of shoes, which came to the possession of the defendant's testator from one Careras, to be carried and conveyed on steamer from New York to Havana, consigned to one Oliver. At the time the plaintiff, by his agent, notified the testator and the master and officers of the steamer of his claim, and demanded a delivery of the property, the cases were stowed in the hold of the vessel and difficult of access, and incapable of delivery, except with considerable labor and at some expense. The delivery would have delayed the departure of the vessel, which was about to commence her voyage. There was evidence tending to show that bills of lading for the property had been issued in the usual form, before any notice of the plaintiff's claim. The plaintiff claimed as owner. He was a resident of Boston, and contracted to sell four cases of shoes to Careras, to be delivered in New York, and paid for on delivery. The shoes were forwarded to New York by railroad and steamboat, the plaintiff taking a receipt for their carriage and giving the same to a clerk, whom he sent with the goods to New York, with directions to deliver the goods to the purchaser on receiving the pay therefor. On his arrival in New York the clerk called on Careras, and informed him of the arrival of the goods, and that he was ready to deliver them on receipt of the purchase price. He was informed by Careras that he would be prepared to pay at a later hour of the day; but as the clerk was leaving, Careras remarked that he would like to examine the goods, and the bill of lading or receipt was given him "for the purpose of examin-

ing the goods." The clerk called at one o'clock, the time appointed, for the payment of the money, and was promised it at three o'clock of the same day. On calling at the last-named hour, the payment was again deferred, and he then went to look after the goods and found they had been removed. They were traced to the testator's ship, to which they had been taken by Careras, and put on board for transportation to Havana, consigned to one Oliver. The plaintiff demanded his goods, and upon their non-delivery this action was brought.

At the close of the trial the plaintiff asked the court to direct a verdict for the plaintiff, on the grounds: 1st. That the goods were feloniously obtained by Careras, and 2d. That there was no evidence for a delivery of the bill of lading, and a verdict was ordered as requested, to which the defendant excepted. The judgment entered upon the verdict was affirmed by the General Term of the Common Pleas of New York City, and from the latter judgment the defendant has appealed to this court.

ALLEN, J. By the larcenous taking of chattels the owner is not divested of his property, and a transfer to a purchaser does not impair the right of the true owner. A purchase of stolen goods either directly from the thief or from any other person, although in the ordinary course of trade and in good faith, will not give a title as against the owner. In the case of a felonious taking of goods, the owner may follow and reclaim them wherever he may find them. A carrier or other bailee can stand in no better situation than a purchaser who has received them in good faith, on a purchase, for their full value.

A larceny has been defined as "the felonious taking the property of another, without his consent and against his will, with intent to convert it to the use of the taker" (Hammond's Case, 2 Leach, 1089), or "the wrongful or fraudulent taking or carrying away by any person of the personal goods of another, with a felonious intent to convert them to his (the taker's) own use and make them his own property without the consent of the owner. 2 East, P. C. 553; 2 Russ. on Crimes, 1; Mowrey *v.* Walsh, 8 Cow. 238.

The fraudulent and wrongful taking being proved with the felonious intent, the *animo furandi*, the only question remaining in any case is whether the taking was with the consent of the owner; for if so, although the consent was obtained by gross fraud, there is no larceny. But the consent must be to part with the property, and not the naked possession for a special purpose. If the owner does not intend or consent to part with his property, then the taking and conversion of it with a felonious intent by one having possession of it, as the property of the owner and for a special purpose, is larceny. If it appear that although there is a delivery by the owner in fact, yet there is no change of property nor of legal possession, but the legal possession still remains exclusively in the owner, larceny may

be committed as if no such delivery had been made. Mowrey *v.* Walsh, *supra*, and cases cited; and 2 Russ. on Crimes, 22; Lewis *v.* Commonwealth, 15 S. & R. 93; Commonwealth *v.* James, 1 Pick. 375; Cary *v.* Hotaling, 1 Hill, 311. The general owner of personal property holds the constructive possession and may maintain trespass, though the actual possession be in another; and one who obtains the bailment of goods, or the possession for a special purpose, fraudulently intending to deprive the owner of his property, may be convicted of larceny. But if the owner intends to part with the property and delivers the possession, there can be no larceny, although fraudulent means have been used to induce him to part with the goods. The delivery of the receipt to Careras was to enable him to examine the goods before paying for them, and for no other purpose; and with the consent of the plaintiff he had access to and possession of the goods for this special purpose. The sale of the goods was for cash, to be paid on delivery; the condition was never waived, and there was no absolute delivery of the goods or of the receipt for them with intent to part with the property, except upon the payment of the purchase price. Had the ship-owner received from Careras the original receipt or bill of lading for the goods, and dealt with him on the faith of it, as evidence of ownership, a different question might have arisen. But Careras had availed himself of that document to possess himself of the property, which he took and removed from its place of deposit to the ship of the defendant's testator. Careras had the naked possession of stolen property, and the ship-owner was not misled or induced to receive it by the production of any other evidence of ownership. Neither did any question arise upon the trial as to the effect, upon the right of the plaintiff to demand an immediate delivery, of the fact that the goods were stored in the hold of the vessel under other goods, and that a breaking up of the cargo would cause delay and expense, and that the officers of the vessel offered to deliver the goods to the owner on the return of the ship from Havana.

There was no conflict of evidence, nor any question to submit, as to the felonious taking of the goods, to the jury.

The plaintiff being clearly entitled to a verdict upon the ground that the goods had been feloniously stolen and taken from him, the other questions made were wholly immaterial. The actual delivery of a bill of lading to the shipper by the testator would have given him no better right to retain the goods for his indemnity than a purchaser in good faith and for value would have done. Neither could acquire any right to withhold stolen property from the plaintiff, the rightful owner.

The goods having been stolen there was no question of negligence or estoppel in the case. A party whose horse is stolen may pursue and reclaim his property, although he has negligently left his stable unlocked.

The question of estoppel would have arisen if the ship-owner had had knowledge of, and acted on, the faith of the original shipping receipt delivered to Careras.

The delivery of the goods for the purpose named, although it enabled Careras to perpetrate a fraud upon the defendant's testator, did not divest the plaintiff of his title or estop him from reclaiming them wherever found.

The judgment must be affirmed.

II. CARRIERS OF PASSENGERS.

1. WHO DEEMED.

BOYCE *v.* ANDERSON.

2 Pet. (U. S.) 150. 1829.

WRIT of error to the Circuit Court of Kentucky.

The case was submitted to the court, on the part of the counsel for the plaintiff in error, Mr. Rowan, upon the following brief.

This was an action in the Court below against defendants in error, owners of the steamboat "Washington," to recover from them the value of four slaves, the property of the plaintiff, who, he alleged, were delivered to the commandants of said boat, to be carried thereon, and who, he alleged, were drowned by the carelessness, negligence, neglect or mismanagement of the captain and commandants of the said steamboat.

[The evidence as set out in the report is omitted. The facts are sufficiently stated in the opinion.]

Upon this evidence the plaintiff moved the court to instruct the jury,

1. That if they find, from the evidence, that the defendants were owners of the steamboat, and by themselves, their officer, or servants of the boat, did actually receive into their yawl the negroes of the plaintiff, to be carried from shore on board the steamboat, they are responsible for neglect and imprudent management, notwithstanding no reward, or hire, or freight, or wages, were to have been paid by Boyce to defendants.

2. That if they find from the evidence that the steamboat "Washington" was owned by defendants, and used by them, on the river, as a common carrier for wages and freight, and that the slaves of plaintiff were actually received by the agents and servants of the defendants, on board of the yawl, of and belonging to the defendants as a tender of the steamboat, to be carried from the land, and put on board the steamboat, to be therein carried and transported, that the defendants were bound to the most skilful and careful management, and if the slaves were drowned in consequence of any omission of such skilful and careful management by the agents and servants in the conduct and navigation of the boat and tender, the defendants are answerable to the plaintiffs for the value of the slaves.

3. That if the jury believe the evidence in this case, the defendants would have had a legal right to demand a reasonable compensation for their undertaking to transport said slaves on board their boat; and their afterwards waiving, or declining that right, from motives of humanity, or any other motive, does not change or diminish their legal responsibility as common carriers for hire or reward.

The defendants moved the court "to instruct the jury that if they find from the evidence that the slaves in controversy were taken on board of the yawl at the instance and in pursuance of the request of the captain of the 'Teche,' from motives of humanity and courtesy alone, that the defendants are not liable, unless they shall be of opinion that the slaves were lost through the gross neglect of the captain of the steamboat, or the other servants or agents of the defendants."

The court gave the first instruction moved by the plaintiff, with this qualification, "that gross negligence or unskilful conduct was required to charge the defendants." The second and third instruction moved by the plaintiff, the court refused to give, and instructed the jury "that the doctrine of common carriers did not apply to the case of carrying intelligent beings, such as negroes; but that the defendants were chargeable for negligence or unskilful conduct." The court gave the instructions asked for by the defendants.

It is believed and alleged that the court erred in refusing to give the instructions required by plaintiff and in giving those required by defendants, and especially in instructing the jury that the doctrine of common carriers did not apply to the case.

Mr. Chief Justice MARSHALL. This was an action brought in the Court of the United States, for the seventh Circuit and District of Kentucky, against the defendants, owners, &c.

There being no special contract between the parties in this case, the principal question arises on the opinion expressed by the court, "that the doctrine of common carriers does not apply to the case of carrying intelligent beings, such as negroes."

That doctrine is, that the carrier is responsible for every loss which is not produced by inevitable accident. It has been pressed beyond the general principles which govern the law of bailment, by considerations of policy. Can a sound distinction be taken beween a human being in whose person another has an interest and inanimate property? A slave has volition, and has feelings which cannot be entirely disregarded. These properties cannot be overlooked in conveying him from place to place. He cannot be stowed away as a common package. Not only does humanity forbid this proceeding, but it might endanger his life or health. Consequently this rigorous mode of proceeding cannot safely be adopted, unless stipulated for by special contract. Being left at liberty, he may escape. The carrier has not, and cannot have, the same absolute

control over him that he has over inanimate matter. In the nature of things, and in his character, he resembles a passenger, not a package of goods. It would seem reasonable, therefore, that the responsibility of the carrier should be measured by the law which is applicable to passengers rather than by that which is applicable to the carriage of common goods.

There are no slaves in England, but there are persons in whose service another has a temporary interest. We believe that the responsibility of a carrier, for injury which such person may sustain, has never been placed on the same principle with his responsibility for a bale of goods. He is undoubtedly answerable for any injury sustained in consequence of his negligence or want of skill; but we have never understood that he is responsible farther.

The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in the cases to which it has been applied, we admit its necessity and its policy, we do not think it ought to be carried farther, or applied to new cases. We think it has not been applied to living men, and that it ought not to be applied to them.

The directions given by the Court to the jury informed them that the defendants were responsible for negligence or unskilful conduct, but not otherwise.

Sir William Jones, in his Treatise on Bailments, p. 14, says, "When the contract is reciprocally beneficial to both parties, the obligation hangs in an even balance; and there can be no reason to recede from the standard: nothing more, therefore, ought in that case to be required than ordinary diligence, and the bailee should be responsible for no more than ordinary neglect." In another place (p. 144) the same author says, "A carrier for hire ought, by the rule, to be responsible only for ordinary neglect; and in the time of Henry VIII. it appears to have been generally holden that a common carrier was chargeable in case of a loss by robbery only when he had travelled by ways dangerous for robbing, or driven by night, or at any inconvenient hour."

This rule, as relates to the conveyance of goods, was changed as commerce advanced, from motives of policy. But if the court is right in supposing that the strict rule introduced for general commercial objects does not apply to the conveyance of slaves, the ancient rule "that the carrier is liable only for ordinary neglect" still applies to them.

If the slaves were taken on board the yawl to be conveyed in the steamboat, solely in consequence of their distress and from motives of humanity alone, no reward, hire, or freight being to be paid for their passage, as the first prayer of the plaintiff and the prayer of the defendant suppose, the carrier would certainly be responsible only in a case of gross neglect; and the qualification annexed to this construction was correct.

We think that in the case stated for the instruction of the Circuit Court the defendants were responsible for the injury sustained, only in the event of its being caused by the negligence or the unskilfulness of the defendants or their agents, and that there is no error in the opinion given.

SHOEMAKER *v.* KINGSBURY.

12 Wall. (U. S.) 369. 1870.

ERROR to the Circuit Court for the District of Kansas.

Suit for damages for personal injuries happening on a rail car; the case being thus: —

In 1867 Shoemaker and another were contractors for building the Eastern Division of the Union Pacific Railway in Kansas; and in October of that year they ran a construction train over a portion of the road, carrying material for it. To this train was attached what was called a "caboose car," — a car for the accommodation of the men connected with the train, who had their "sleeping bunks" in this car, and who stored their tools there, as also the lamps used on the cars. The road was not yet delivered over to the Pacific Railway Company, and the contractors did not wish to carry passengers. Persons, however, were sometimes carried on the caboose car, and sometimes fare had been charged for their passage, but not always.

In this state of things, one Kingsbury, a sheriff in Kansas, and a deputy marshal, wanted to make an arrest on the line of the road, and he applied for passage as far as to a place called Wilson's Creek, asking the conductor to stop the train there, in order that he might make the arrest. He was accordingly taken on the train, and the train stopped until he had made the arrest.

A part of the fare charged was paid by Kingsbury on the cars, and the balance afterwards. The train ran from Ellsworth to Walker's Creek in Kansas. In going towards Walker's Creek the train was made up and ran in the usual way of making up and running railway trains, the engine being in front, with the caboose and flat cars attached in regular order. But on the return from Walker's Creek, as there was, as yet, no turntable on the road, the usual order for making up such trains was reversed, and both engine and tender were backed over the road, a distance of more than fifty miles: the tender being ahead, the engine next, the caboose and other cars attached, and following in regular order. When about three miles from Ellsworth, on this return trip, both the engine and tender were thrown from the track and upset. At the time this accident occurred, Kingsbury was riding in the caboose car with the

conductor of the train, and either jumped out or was thrown out, which of the two did not exactly appear. Whichever of the two things was true, he was hurt, and for the injuries which he received he brought the action below.

The accident was occasioned by the engine running against a young ox, which leaped on to the track about twenty feet in front of the advancing train, from grass or weeds five or six feet high, growing on the sides of the road. The train was running at its usual rate of speed. The accident occurred just after dark; but it was a moonlight night, and the engineer testified that he could have seen an animal two hundred yards distant on the track; that the animal was only about twenty feet from the engine when first seen. He continued his testimony thus: —

"As soon as I saw the animal I shut off the steam, and seized the lever to reverse the engine, and had it about half over when the engine went off the track. Something struck me on the head and I did not know anything more. I was injured. I did what I thought was best to be done to stop the train. The whistle lever was in the top of the cab. I did not whistle for brakes. I had no time to do so after I saw the animal and before the engine went off the track. The train could have been stopped in about one hundred and fifty yards. When danger appears the first thing to be done is to reverse the engine and then sound the whistle for brakes. Both could not be done at the same time. In order to reverse and blow the whistle two motions are necessary, — first, to cut off the steam, and then take hold of the lever to throttle valve and move it over. It takes both hands to reverse. The whistle is sounded by a lever in the top of the cab. Brakemen would know, by shutting off steam and reversing, that something was the matter. It would take about ten seconds to do all this. I did it as quick as I could. I could have done nothing more than I did do."

There was no fence on the sides of the road. The plaintiff had been several times before over the road and knew its condition, and the manner in which the trains were made up and run.

The court, among other instructions, gave the following as a fifth to the jury, to which the defendants excepted: —

"*When it was proved that the car was* THROWN *from the track, and the plaintiff injured, it is incumbent on the defendants to prove that the agents and servants in charge of the trains were persons of competent skill,* OF GOOD HABITS, *and in every respect qualified and suitably prepared for the business in which they were engaged,* AND that they acted on this occasion with reasonable skill, and with the *utmost* prudence and caution; and if the disaster in question was occasioned by the *least* negligence, *or want of skill* or prudence on their part, then the defendants are liable in this action."

There was no evidence in the case in relation to the skill, habits, or qualifications of the agents and servants of the defendants, except

what arose from the fact that the engineer had been employed on a railroad about four years, and had been engineer for more than two years, and that the fireman had been on a railroad for about eighteen months.

Verdict and judgment having gone for the plaintiff, the defendants brought the case here on error.

Mr. Justice Field. From the whole evidence in this case it is plain that the defendants were not common carriers of passengers at the time the accident occurred, which has led to the present action. They were merely contractors for building the Eastern Division of the Union Pacific Railway, and were running a construction train to transport material for the road. The entire train consisted, besides the engine and its tender, of cars for such material, and what is called in the testimony a "caboose car." This latter car was intended solely for the accommodation of the men connected with the train; it contained their bunks and mattresses; they slept in it, and deposited in it the lamps of the car, and the tools they used. It was not adapted for passengers, and, according to the testimony of the conductor, the defendants did not wish to carry passengers, although when persons got on to ride the defendants did not put them off, and sometimes, though not always, fare was charged for their carriage.

The plaintiff, who was sheriff of a county in Kansas, and deputy marshal of the district, desired to arrest a person on the line of the road, and, to enable him to accomplish this purpose, he applied to the conductor for passage on the train as far as Wilson's Creek, and requested that the train would stop there until the arrest could be made. His wishes were granted in both respects, and for the services rendered he paid at the time a portion of the fare charged, and the balance subsequently.

In the rendition of these services for the plaintiff the defendants were simply private carriers for hire. As such carriers, having only a construction train, they were not under the same obligations and responsibilities which attach to common carriers of passengers by railway. The latter undertake, for hire, to carry all persons indifferently who apply for passage; and the law, for the protection of travellers, subjects such carriers to a very strict responsibility. It imposes upon them the duty of providing for the safe conveyance of passengers, so far as that is practicable by the exercise of human care and foresight. They are bound to see that the road is in good order; that the engines are properly constructed and furnished; that the cars are strong, and fitted for the accommodation of passengers, and that the running gear is, so far as the closest scrutiny can detect, perfect in its character.

If any injury results from a defect in any of these particulars they are liable.

They are also bound to provide careful and skilful servants, com-

petent in every respect for the positions to which they are assigned in the management and running of the cars; and they are responsible for the consequences of any negligence or want of skill on the part of such servants.

They are also bound to take all necessary precautions to keep obstructions from the track of the road; and although it may not be obligatory upon them, in the absence of legislative enactment, to fence in the road so as to exclude cattle, it is incumbent upon them to use all practical means to prevent the possibility of obstruction from the straying of cattle on to the track as well as from any other cause. As said by the Supreme Court of Pennsylvania, in speaking of the duty of railway companies in this particular:[1] "Having undertaken to carry safely, and holding themselves out to the world as able to do so, they are not to suffer cows to endanger the life of a passenger any more than a defective rail or axle. Whether they maintain an armed police at cross-roads, as is done by similar companies in Europe, or fence, or place cattle-guards within the bed of their road, or by any other contrivance exclude this risk, is for themselves to consider and determine. We do not say they are bound to do the one or the other, but if, by some means, they do not exclude the risk, they are bound to respond in damages when injury accrues."

It is evident that the defendants in this case were not subject to any such stringent obligations and responsibilities as are here mentioned. They did not hold themselves out as capable of carrying passengers safely; they had no arrangements for passenger service, and they were not required to make provisions for the protection of the road such as are usually adopted and exacted of railroad companies. They did not own the road, and had no interest in it beyond its construction. It was no part of their duty to fence it in or to cut away the bushes or weeds growing on its sides.

The plaintiff knew its condition and the relation of the defendants to it when he applied for passage. He had been previously over it several times, and was well aware that there was no turntable on a portion of the route; a fact, which compelled the defendants to reverse the engine on the return of the train from Walker's Creek. He, therefore, took upon himself the risks incident to the mode of conveyance used by the defendants when he entered their cars. All that he could exact from them, under these circumstances, was the exercise of such care and skill in the management and running of the train as prudent and cautious men, experienced in that business, are accustomed to use under similar circumstances. Such care implies a watchful attention to the working of the engine, the movement of the cars and their running gear, and a constant and vigilant lookout for the condition of the road in advance of the train. If such care and skill were used by the defendants, they discharged

[1] Pittsburg & Connellsville R. Co., 30 Penn. St. 234.

their entire duty to the plaintiff, and if an accident, notwithstanding, occurred, by which he was injured, they were not liable. They were not insurers of his safety, nor responsible for the consequences of unavoidable accident.

The question should have been put to the jury whether the defendants did, in fact, exercise such care and skill in the management and running of the train at the time the accident occurred. They were not responsible to the plaintiff unless the accident was directly attributable to their negligence or unskilfulness in that particular.

The evidence in the case shows that the accident was occasioned by the tender and engine running against a steer. The train was proceeding at its usual rate of speed when the steer suddenly, from a mass of high weeds or grass growing on the sides of the road, leaped upon the track directly in front of the advancing train, at a distance from it of about twenty feet. This distance was so short, and the movement of the animal was so sudden, that it was impossible to arrest the train, and a collision followed which threw the engine and tender from the track. The plaintiff, on the happening of the collision, either leaped from the "caboose car," in which he was at the time sitting, or was thrown from it, it is immaterial which, and was injured.

The fifth instruction given by the court turned the attention of the jury from the simple question at issue for their determination, and directed it to the skill, habits, and attainments for their business of the agents and servants of the defendants, as well as to their conduct on the occasion of the accident. It held proof that the agents and servants were possessed of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which they were engaged, as essential as proof that they acted on the occasion with skill, prudence, and caution. And it made the occurrence of the accident presumptive evidence that they were destitute of such skill, habits, and qualifications.

We are of opinion that the court erred in this instruction, and that it misled the jury. On this ground the judgment of the court below must be

Reversed, and the cause remanded for a new trial.

HOAR *v.* MAINE CENTRAL R. CO.

70 Maine, 65. 1879.

Appleton, C. J. The material and substantive allegations in the several counts in the plaintiff's writ are that the defendants are common carriers of passengers between Waterville and West Water-

ville; that as such carriers they are bound to carry all passengers and persons lawfully on their road carefully and safely over the same; that the plaintiff's intestate, being invited by one Potter, a foreman of a section in their employ and intrusted by them with the care and control of one of their hand-cars, to ride with him on said hand-car from Waterville to West Waterville, accepted the invitation; that the plaintiff's intestate, while riding, was run over by one of the defendants' engines, to which a paymaster's car was attached, and injured so that he died, and that this was through the negligence of the defendants and their servants, the deceased being in the exercise of due care.

To each count of the declaration the defendants filed a general demurrer.

I. The liability of a railroad company differs as to their duty to their servants and to passengers. They are liable to servants, for injuries resulting from want of due care in the selection of fellow-servants, but if duly selected, they do not guarantee against their negligence. Blake *v.* M. C. R. R. Co., *ante*. Not so as to passengers, to whom they are responsible for injuries arising from their negligence or incapacity, irrespective of the question of more or less care in their selection. It is obvious that there is no defect in the declaration so far as it relates to the negligence of the defendants, if they are to be deemed common carriers by hand-cars.

II. The plaintiff's intestate was to be carried gratuitously. But that does not place him in a different position, so far as relates to his right to protection from neglect, from a pay passenger, — if he is to be regarded as a passenger to be carried by the defendants. Phil. & Read. R. R. Co. *v.* Derby, 14 How. (U. S.) 468. Wilton *v.* Middlesex R. R. Co., 107 Mass. 108 [544]. Whar. Neg., § 355.

III. The plaintiff places her right to recover upon a neglect by the defendants of their duties to the intestate as common carriers. To impose upon the defendants the duties and responsibilities of common carriers, they must be shown to be such. The grave and important question, then, is whether the defendants, though common carriers of passengers along their road and in their cars for that purpose, are common carriers of passengers by their hand-cars used by their section men. Were the defendants chartered as common carriers save by their cars for passengers? Have they by their acts or conduct held out to the public, or authorized their agents to hold out to the public, that they are common carriers by their hand-cars? If they have not been chartered, and have not in any way held themselves out, as common carriers by hand-cars, then the duties and obligations resting upon them as carriers have not arisen.

If the defendants were common carriers in relation to the plaintiff's intestate, they would be bound to carry all who should apply. Were, then, the defendants bound to carry on their hand-cars any one seeking to be so conveyed? Assuredly not.

In Graham *v.* Toronto, Grey & Bruce Railway Co., 23 Up. Can. (C. P.) 514, the defendants agreed, with a contractor for the construction of their railway, to furnish a construction train for ballasting and laying the track for a portion of their road then under construction; the defendants to provide the conductor, engineer, and fireman; the contractor furnishing the brakemen. On October 31, 1872, after work was over for the day and the train was returning to Owen Sound, where the plaintiff, one of the contractor's workmen, lived, the plaintiff, with the permission of the conductor but without the authority of the defendants, got on. Through the negligence of the person in charge of the train an accident happened, and the plaintiff was injured. "The fact," remarks Hagarty, C. J., "that the defendant's engine-driver or conductor allowed him to get on the platform, does not alter my view of the case.

"I cannot distinguish it from the case of a cart sent by its owner under his servant's care to haul bricks or lumber for a house he is building. A workman, either with the driver's assent or without any objections from him, gets upon the cart. It breaks down, or by careless driving runs against another vehicle, or a lamp post, and the workman is injured. I cannot understand by what process of reasoning the owner can in such case be held to incur any liability to the person injured. Nor in my opinion, would the fact that the owner was aware that the driver of his cart often let a friend or person doing work at his house drive in his cart make any difference. . . . It could never be, I think, in the reasonable expectation of these defendants that they were incurring any liability as carriers of passengers, or that they should provide against contingencies that might affect them in that character."

A similar question arose in Sheerman *v.* Toronto, Grey & Bruce Railway Co., 34 Up. Can. (Q. B.) 451, where one of the workmen was being carried, without reward, on a gravel train, and was injured so that he died, it was held that the deceased was not lawfully on the cars with the consent of the defendants, and a nonsuit was directed. "The workmen," observes Wilson, J., "were not lawfully on the cars. They were not passengers being carried by the defendants. They were acting on their own risk, not at the risk of the defendants, and however unfortunate the disaster may have been, it is only right the legal responsibility should fall on those who ought to bear it, and not upon those upon whom it does not rest." In this case "it appeared that it was not necessary the defendants should carry the men to and from their work, and that they never agreed to do more than to provide cars for carrying ballasting and materials for track laying."

The defendants not being common carriers, so far as relates to their liability to the plaintiff's intestate, the declaration not disclosing facts which show such liability must be adjudged bad. Eaton *v.* Delaware, L. & W. R. R. Co., 57 N. Y. 383. Union Pacif. R.

R. Co. v. Nichols, 8 Kan. 505. In Dunn v. Grand Trunk R. R. Co., 58 Maine, 187, the plaintiff was riding in a saloon car attached to a freight train, and paid the customary fare for conveyance in a passenger car.

IV. A master is bound by the acts of his servant in the course of his employment, but not by those obviously and utterly outside of the scope of such employment. If not common carriers, a section foreman with his hand-car has no right to impose upon the defendants the onerous responsibilities arising from that relation. He has no right to accept passengers for transportation and bind the defendants for their safe carriage, and every man may safely be presumed to know thus much.

If the risk is much greater by this mode of conveyance, the plaintiff's intestate by adopting it assumed the extra risks arising therefrom, and must be held to abide the unfortunate consequences.

No one becomes a passenger except by the consent, express or implied, of the carrier. There is no allegation of express consent by the defendants, nor of anything from which consent can be implied that the plaintiff's intestate should be carried at their risk by this unusual mode of conveyance.

Declaration bad.

HOUSTON AND TEXAS CENTRAL R. CO. *v.* MOORE.

49 Tex. 31. 1878.

August 10, 1872, William C. Moore, husband of Mary A. Moore, was on a freight train running on the Houston and Texas Central Railway between Hempstead and Houston. At a point about two miles and a half west of Hockley station the train ran off the track, and Moore received injuries, from the effects of which he died.

March 3, 1873, Mary A. Moore brought suit against the railway company, in her own right, and as mother and natural guardian of William J. Moore, aged about thirteen years, and Mattie F. Moore, aged about eight years. The plaintiff alleged that her husband came to his death by the negligence of the defendants, its agents and servants, under circumstances such as to make the defendant liable, and claimed damages to the amount of fifty thousand dollars.

The defendant excepted to the petition, because the proper parties were not shown to have been made; pleaded the general issue; and specially alleged in defence that the car or train on which the deceased was, at the time he received the injury, was a freight train, and that he was on said train without the consent of the defendant, and knowingly in violation of defendant's orders and instructions; that the injuries were the result of the gross negli-

gence and carelessness of the deceased, and not owing to the negligence or carelessness of the defendant, its servants, or agents.

. . . . . .

The jury returned a verdict for plaintiff for five thousand dollars, upon which judgment was rendered.

Writ of error by the defendant.

Moore, Associate Justice. . . . . .

It appears, on the face of appellee's petition, that the deceased, when he received the injuries which caused his death, was on a freight train. The evidence shows that there was no person on said train but the employees of appellant, except the deceased, who had been an engine-driver, running a train on appellant's road for a year or two, until about a month or six weeks previous to his death, and well knew that passengers were not allowed to travel on freight trains on appellant's road; that the officers in charge of such trains were forbidden to allow parties to ride upon them without a special pass from the general superintendent of the road; that no such pass could be gotten without a release of appellant from damages in case of accident; that this was the condition upon which permits to ride upon freight trains were given, because of the greater risk of accidents to passengers on freight trains than on passenger trains, and because the company would not assume such risks on behalf of persons desiring to travel in this unusual and extra-hazardous manner.

On the other hand, it cannot be doubted that deceased was riding on the train with the knowledge and consent of the conductor. But whether he paid fare, or had a pass or permit to travel on a freight train, is not shown.

Under this state of case, the question to be determined is whether appellant had assumed the risk of a common carrier of passengers in respect to the deceased, while thus riding upon its freight train; or, in other words, whether deceased was, in contemplation of law, a passenger on appellant's train; or if not such passenger, strictly speaking, whether the assent of the conductor to his getting upon the train gave him the right to ride upon it, and render appellant responsible for any injury done him while thus on the train, to which he in no manner contributed.

Appellant, as a railway company, is a common carrier of both freight and passengers; but has, unquestionably, the right to make reasonable regulations for conducting its business; and parties dealing with it must conform to such regulations. That a regulation of a railway company, that freight and passengers will be carried on its road in separate trains, is a reasonable regulation, can hardly be doubted by any one. Indeed, it seems a highly salutary regulation for the public as well as the company. Nor can it be controverted, when a railroad company makes other suitable provision for passenger travel, that no one has the right to demand that he shall be allowed to ride in its trains devoted exclusively to the carrying of

freight. If a party, in violation of such regulation, and without the consent of the company, forces himself into one of its freight trains, it surely cannot be supposed that the company could be held responsible to him in its character as a carrier of passengers; or that the party who should thus contribute to the injury which he might sustain while thus wrongfully in the train, may maintain an action against the company for such injury. Unless he could, an action cannot be maintained under the statute by his heirs, representatives, and relatives, in case of his death.

It may be true, where a railroad company habitually permits passengers to travel on its freight trains, notwithstanding it may by regulation prohibit it, that the company will incur the same responsibility to such passengers as if they were on the regular passenger cars. But when it is shown that the regulations of the company absolutely forbid passengers riding on freight trains, and where there are no cars attached to such trains except those ordinarily accompanying trains exclusively for freight, or such as, by their appearance and manner in which they are fitted up, could not be properly regarded as inviting passengers into the train, the burden of proving that the party injured was justified in going upon such train as a passenger, properly devolves upon those who sue for damages resulting from injuries sustained by him while on such train. Do the facts in this case show that appellant permitted passengers to travel on its freight trains, notwithstanding its regulation prohibiting it, to an extent or in a manner to warrant the deceased in supposing that he was authorized to get upon its freight train as a passenger? Certainly they do not.

If, then, it can be inferred that the deceased was properly on the train, it must be upon the supposition that he had a special permit; or that the conductor of the train was authorized to annul or waive the regulation of the company, prohibiting passengers from travelling in freight trains. But the evidence shows that the conductor had no such authority, and that the deceased must have known that he had not.

This is not the case of an ordinary traveller, unacquainted with the regulations of the railroad, or if acquainted with them at all, only in a general way; or of one who is uninformed as to the powers and functions of the officer in charge of the train, and who, if he knew that passengers had been sometimes carried by such train, might suppose that the officer in charge of it had authority to relax or set aside the rule in special cases; which seems to be the extent to which the case of Dunn *v.* Grand Trunk Railway, 58 Me., 187, relied upon by appellee, goes, — but which, even on its facts, seems to be greatly questioned by Judge Redfield, the distinguished commentator on railroad law (Redf. Am. Railroad Cases, 490); and to have been denied by the New York Commissioners of Appeal, in the case of Eaton *v.* The Delaware, &c. [57 N. Y. 382]. Here, the

deceased, who, only a short time previously to his going on the train, had been in the employment of appellant, must have known that the conductor was forbidden to allow him to travel as a passenger upon the train.

It cannot, in view of all the facts of this case, be said that appellant had undertaken or contracted with the deceased to carry him as a passenger over its road, or that we are warranted in saying the *prima facie* presumption that the deceased was wrongfully upon appellant's train, when he received the injuries which caused his death, has been rebutted; and, if death had not ensued, that he could have maintained an action against appellant on account of the injuries which he received by the wreck of the train. The judgment must therefore be reversed and the cause remanded. And it is so decreed.

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2. PUBLIC CALLING.

BENNETT *v.* DUTTON.

10 N. H. 481. 1839.

The declaration alleged that the defendant was part owner and driver of a public stage-coach from Nashua to Amherst and Francestown; that on the 31st January, 1837, the plaintiff applied to him to be received into his coach, at Nashua, and conveyed from thence to Amherst, offering to pay the customary fare; and that the defendant, although there was room in his coach, refused to receive the plaintiff.

It appeared in evidence, that at the time of the grievance alleged there were two rival lines of daily stages, running between Lowell, in Massachusetts, and Nashua; that Jonathan B. French was the proprietor of one of these lines, and Nelson Tuttle of the other; that Tuttle's line ran no farther than from Lowell to Nashua; that French and the proprietors of the defendant's line were interested in a contract for carrying the United States mail from Lowell to Francestown, through Amherst (dividing the mail money in proportion to the length of their respective routes), so as to form one continuous mail route from Lowell to Francestown; that French and the proprietors of the defendant's line had agreed to run their respective coaches so as to form a continuous line for passengers from Lowell, through Amherst, to Francestown, and that their agents and drivers might engage seats for the whole distance, at such rates of fare as they thought expedient; and the amount thus received, in instances where they thought proper to receive less

than the regular fare, was to be divided between said proprietors, in proportion to the length of their respective routes; that it was also agreed, that if the defendant's line brought down to Nashua an extra number of passengers, French should see them through, and do at the expense of furnishing extra coaches and horses, if necessary, to convey them to Lowell; and, on the other hand, if French's line brought up an extra number of passengers from Lowell to Nashua, the proprietors of the defendant's line were to do the same, for the conveyance of such passengers above Nashua; and that it was further agreed (as Tuttle's line ran no farther than from Lowell to Nashua) by the proprietors of the defendant's line, that they would not receive into their coaches, at Nashua, passengers for places above Nashua, who came up from Lowell to Nashua, on the same day, in Tuttle's line; the time of starting from Lowell and arriving at Nashua being the same in both lines.

One of the requisitions of mail contracts is, that each line of stage-coaches running into another, so as to form a continuous mail line, shall give preference to passengers arriving in the line with which it connects, and shall forward them in preference to any others.

There were several other lines which started from Lowell at the same time with the lines before mentioned, running to other places, through Nashua; and it was generally the understanding between their respective proprietors, that one line should not take, for a part of the distance where the route was the same, passengers who were going on further in another line; though this understanding had been occasionally interrupted.

The plaintiff being at Lowell on the 31st of January, 1837, took passage and was conveyed to Nashua in Tuttle's line; and immediately on his arrival at Nashua applied to be received into the defendant's coach, and tendered the amount of the regular fare. There was room for the plaintiff to be conveyed on to Amherst, but the defendant refused to receive him.

The plaintiff was notified, by the agent of the line of French and the defendant, at Lowell, previous to taking passage in Tuttle's coach for Nashua, that if he wished to go from Nashua to Amherst on that day, in the regular mail line, he must take the mail line at Lowell; and that if he took passage in Tuttle's line from Lowell to Nashua he would not be received, at Nashua, into the defendant's coach.

The parties agreed that judgment should be rendered for the plaintiff, for nominal damages, or for the defendant, according to the opinion of this court upon these facts.

PARKER, C. J. It is well settled that so long as a common carrier has convenient room, he is bound to receive and carry all goods which are offered for transportation, of the sort he is accustomed to carry, if they are brought at a reasonable time, and in a suitable

condition. Story on Bailments, 328; 5 Bing. R. 217 [**169**], Riley *v.* Horne (15 Eng. C. L. R. 426).

And stage-coaches which transport goods as well as passengers, are, in respect of such goods, to be deemed common carriers, and responsible accordingly. Story, 325.

Carriers of passengers, for hire, are not responsible, in all particulars, like common carriers of goods. They are not insurers of personal safety against all contingencies, except those arising from the acts of God and the public enemy. For an injury happening to the person of a passenger by mere accident, without fault on their part, they are not responsible; but are liable only for want of due care, diligence, or skill. This results from the different nature of the case. But in relation to the baggage of their passengers, the better opinion seems to be that they are responsible like other common carriers of goods.

And we are of opinion that the proprietors of a stage-coach, for the regular transportation of passengers, for hire, from place to place, are, as in the case of common carriers of goods, bound to take all passengers who come, so long as they have convenient accommodation for their safe carriage, unless there is a sufficient excuse for a refusal. 2 Sumner, 221 [**519**], Jencks *v.* Coleman; 19 Wend. R. 239.

The principle which requires common carriers of goods to take all that are offered, under the limitations before suggested, seems well to apply.

Like innkeepers, carriers of passengers are not bound to receive all comers. 8 N. H. Rep. 523, Markham *v.* Brown. The character of the applicant, or his condition at the time, may furnish just grounds for his exclusion. And his object at the time may furnish a sufficient excuse for a refusal; as, if it be to commit an assault upon another passenger, or to injure the business of the proprietors.

The case shows the defendant to have been a general carrier of passengers, for hire, in his stage-coach, from Nashua to Amherst, at the time of the plaintiff's application. It is admitted there was room in the coach; and there is no evidence that he was an improper person to be admitted, or that he came within any of the reasons of exclusion before suggested.

It has been contended that the defendant was only a special carrier of passengers, and did not hold himself out as a carrier of persons generally; but the facts do not seem to show a holding out for special employment. He was one of the proprietors, and the driver, of a line of stages from Nashua to Amherst and Francestown. They held themselves out as general passenger carriers between those places. But, by reason of their connection with French's line of stages from Lowell to Nashua, they attempted to make an exception of persons who came from Lowell to Nashua, in Tuttle's stage, on the same day in which they applied for a passage for the north. It

is an attempt to limit their responsibility in a particular case, or class of cases, on account of their agreement with French.

It is further contended that the defendant and other proprietors had a right to make rules for the regulation of their business, and among them a rule that passengers from Lowell to Amherst and onward should take French's stage at Lowell; and that by a notice brought home to the individual the general responsibility of the defendant, if it existed, is limited.

But we are of opinion that the proprietors had no right to limit their general responsibility in this manner.

It has been decided, in New York, that stage-coach proprietors are answerable, as common carriers, for the baggage of passengers; that they cannot restrict their common-law liability by a general notice that the baggage of passengers is at the risk of the owners; and that if a carrier can restrict his common-law liability it can only be by an express contract. 19 Wend. 234 [173]. Hollister *v.* Nowlen. And this principle was applied, and the proprietors held liable for the loss of a trunk, in a case where the passenger stopped at a place where the stages were not changed, and he permitted the stage to proceed, without any inquiry for his baggage. 19 Wend. 251. Cole *v.* Goodwin. However this may be, as there was room in the defendant's coach, he could not have objected to take a passenger from Nashua, who applied there, merely because he belonged to some other town. That would furnish no sufficient reason, and no rule or notice to that effect could limit his duty. And there is as little legal reason to justify a refusal to take a passenger from Nashua, merely because he came to that place in a particular conveyance. The defendant might well have desired that passengers at Lowell should take French's line, because it connected with his. But if he had himself been the proprietor of the stages from Lowell to Nashua, he could have had no right to refuse to take a passenger from Nashua, merely because he did not see fit to come to that place in his stage. It was not for him to inquire whether the plaintiff came to Nashua from one town or another, or by one conveyance or another. That the plaintiff proposed to travel onward from that place could not injuriously affect the defendant's business; nor was the plaintiff to be punished, because he had come to Nashua in a particular manner.

The defendant had good right, by an agreement with French, to give a preference to the passengers who came in French's stage; and as they were carriers of the mail on the same route, it seems he was bound so to do without an agreement. If, after they were accommodated, there was still room, he was bound to carry the plaintiff, without inquiring in what line he came to Nashua.

Judgment for the plaintiff.

NEVIN *v.* PULLMAN PALACE CAR CO.

106 Ill. 222. 1883.

Mr. Justice Mulkey. This was an action on the case, brought by Luke Nevin, the plaintiff in error, in the Circuit Court of McLean County, against the Pullman Palace Car Company, the defendant in error, for refusing to permit him to occupy a sleeping berth in one of its cars, which had been assigned to him, and which he was ready and offered to pay for. The Circuit Court sustained a general demurrer to the declaration, and the plaintiff electing to stand by his declaration, judgment was entered against him for costs, which, on appeal, was affirmed by the Appellate Court for the Third District, and the plaintiff in error brings the record here for review.

The declaration, omitting mere formal averments and unnecessary verbiage, charges, in substance, that the plaintiff, on the 4th day of August, 1881, at Dubuque, Iowa, purchased of the Illinois Central Railroad Company, for his niece, wife, and himself, respectively, three first-class passenger tickets over that company's railway, from Dubuque, Iowa, to Chicago, this State; that having provided himself with these tickets, he, together with his wife and niece, about ten o'clock of the night of that day, and just before the train from Dubuque to Chicago started out, entered a sleeping car called "Kalamazoo," belonging to and constituting a part of said train, which said sleeping car was then in the possession and under control of the defendant; that upon entering the car he engaged of the conductor of said car two lower berths, at one dollar and fifty cents each; that the conductor thereupon assigned one berth to his niece, and one to plaintiff and his wife, promising to have them made up a little later in the night; that he and his wife took the seats in the berth assigned to them, and remained sitting up, in an orderly manner, until about twelve o'clock, frequently, in the mean time, requesting the conductor to have the berths made up, so they could retire to rest, and at the same time tendering to him the price agreed to be paid therefor; that on the arrival of the train at Lena, this State, about the hour just stated, plaintiff temporarily left his seat, and stepped out on the platform of the sleeper, intending to return immediately to his berth, when the conductor instantly closed and secured the outer doors of said sleeper, and thereby prevented him from again entering the same; that plaintiff endeavored to open said doors and re-enter said car, and frequently requested the conductor to permit him to do so, but that said conductor, instead of complying with his request, removed his satchel, coats, and shoes from the

berth so assigned to him and his wife, to another car, and ejected the latter from said sleeper; by means of which plaintiff was compelled to take and occupy a seat in a common passenger car on said train till its arrival in Chicago, by reason of which plaintiff was deprived of his rest and sleep, in consequence of which "he became exceedingly weary and sick, and was greatly humiliated," &c.; that his expulsion from his berth in the manner stated was done wilfully and maliciously, and that the only reason assigned by the conductor for refusing the price of the berths was, "that they were not made up."

It is not claimed or pretended, as we understand counsel, that the facts alleged in the declaration do not show a good cause of action, but the claim rather is, that they disclose a right to recover in assumpsit, and not in case, — or, in other words, the contention is, that the plaintiff has misconceived his action; that the only wrong complained of consists of a breach of an express contract, and therefore the action should have been brought in form *ex contractu*, and not in form *ex delicto*, as it was.

We shall not attempt a review of the authorities, with a view of extracting from them some general principle or rule by which the question in hand may be satisfactorily solved, but shall content ourselves with adverting to such general rules and principles relating to the subject as are fully established by the authorities, and which we regard as conclusive of the question. We have been led to adopt this course mainly from two considerations. In the first place, the cases bearing on the question are so very numerous that a general review of them would be an almost endless undertaking; and in the next place, it would be impossible to harmonize all that has been said by the courts, even of the highest character, in attempting to define the true and exact limits of an action on the case.

To proceed, then, it is agreed by all the authorities the *gravamen* of the charge in an action on the case is the tort or wrong of the defendant, notwithstanding such tort or wrong may be also a breach of an express or implied contract, whereas in an action *ex contractu* the *gist* of the action is the breach of the contract, without regard to the tortious character of the act of the defendant. It follows, therefore, if there is a right of recovery at all in this case, it must be upon the ground the defendant has been guilty of some tort or wrong resulting in damage to the plaintiff. That the conduct of the defendant was wrong and indefensible, and that the plaintiff was subjected to great inconvenience and suffering in consequence of it, is not, and cannot be denied; but the contention is, that all the defendant did on the occasion was a mere breach of the special contract between the parties, and that the remedy therefore is on the contract, and not in tort, — and this is the vital question in the case.

Without stopping, for the present, to inquire whether the posi-

tion of the defendant is well founded to the extent claimed, but conceding it to be so for the purposes of the argument, is it true, as a universal proposition, that this form of action will not lie in any case where the conduct complained of is a direct breach of an express contract? Certainly not. A simple illustration will demonstrate the fallacy of such a position. Suppose A contracts with B to keep the latter's horse for an indefinite period at fifty cents a day, the horse to be returned to B on demand, and A, after having been paid all charges for the keep of the horse, should refuse to redeliver him to B, on demand, no one, in such case, would question for a moment the right of B to maintain an action of trover against A for the horse, which is one species of the action on the case, and yet, in the case supposed, the refusal of A to deliver the horse, the real cause of action is, in the strictest sense of the term, a direct breach of the special contract between the parties. While the fact that the act or acts complained of constitute the breach of a special contract between the parties may always be looked to, in connection with other elements that enter into the question, it is by no means conclusive in determining whether case will lie. An examination of the standard authors who have treated of this subject, as well as of the decisions bearing on the question, conclusively shows that there are many elements that often enter into the question besides the one just mentioned, such as the business, profession or calling of the wrong-doer; the character of the relations between the parties, — whether one of trust and confidence, or otherwise; whether the defendant rests under any implied duties or obligations to the plaintiff, arising either *ex contractu* or *ex lege*, and the like. One or more of these considerations often become important factors in determining whether the action will lie.

It is a familiar doctrine that case will lie for a mere nonfeasance against persons exercising certain public trades or employments, where no contractual relation exists between them and the plaintiff, as where a common carrier, having the requisite means of transportation, refuses to carry goods or passengers. Chitty, in discussing this matter, in his work on Pleadings, says: "There are, however, some particular instances of persons exercising certain public trades or employments, who are bound by law to do what is required of them in the course of their employments without aid of express contract, and are in return entitled to a recompense, and may, therefore, be sued in case, as for a breach of duty in refusing to exercise their callings, — as, where a common carrier, having convenience, refuses to carry goods, being tendered satisfaction for the carriage; or an inn-keeper to receive a guest, having room for him; or a smith having materials for the purpose, to shoe a horse for a traveller; or a ferryman to convey one over a common ferry, and the like." (Vol. I. 136.) It is clear, from the language of this author, the classes of persons enumerated are intended as mere examples of the applica-

tion of the general principle stated, and not as a limitation of the rule itself, and by a well-recognized rule of the common law the same principle should be extended to all other trades and callings that bear the same relation to the public as those just enumerated, and the fact that no precedent can be found for it is entitled to but little consideration, when it is clear the case in hand falls within the principle. This is particularly true with respect to extending as a remedy the action we are considering, to new states of facts, where they clearly fall within the general principle upon which the action is maintained. To the objection there was no precedent for the action made on a certain occasion before Pratt, Ch. J. (afterwards Lord Camden), he is reported to have said: "I wish never to hear this objection again. The action is for a tort. Torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief." Indeed, the writ in case, as its very name imports, was invented for the express purpose of giving a remedy where none of the old forms of writs were applicable, and the British Parliament, by Stat. Westm. 2 C. 24, with the view of promoting the remedy by this writ, expressly directed that "where in one case a writ is granted, in like case, when like remedy falleth, the writ shall be made as hath been used before;" and when "in one case a writ is found, and in like case, falling under like law, and requiring like remedy, *is found none*, the clerks of the chancery shall agree in making the writ." 2 Inst. 404.

Since, as we have just seen, certain legal consequences affecting the question we are considering result from the exercise of certain public trades or employments, it becomes important to determine, with some degree of particularity, the true relation which the Pullman Palace Car Company sustains to the public, and to point out, so far as we are able, the difference between it and persons or companies exercising public callings or employments like those above enumerated, if, indeed, any such difference exists. Like an ordinary railway company engaged in the transportation of freight and passengers, this company transacts its entire business, so far as it relates to this case, over the various railways in this and other States. Like railway companies, it exercises special privileges and franchises granted to it by the State, and its business is transacted almost exclusively with the travelling public. Its cars on the various lines of road are extensively advertised all over the country, setting forth, in fitting terms, the accommodations and comforts they afford, rates of charges, &c., and the public are earnestly invited to avail themselves of the advantages and comforts they thus offer. In what respect, then, does this company differ in its relation to the public, so far as the present inquiry is concerned, from an ordinary railway company? No difference has been pointed out by counsel, and we are confident none can be. Why, then, should not the same principles be held to apply to it that apply to common carriers, and

others in like employments, in so far as their relation to the public is the same? To say there is no precedent for it, we have just seen, is not a sufficient answer. Indeed, it has ever been the boast of the common law, that, by reason of its elasticity, it adjusts and moulds itself to meet the constant changes in the affairs of life, and that it never hesitates to apply old rules to new cases, when it is clear they come within the reasons or principles of such rules. The business of this company in running its elegant and commodious sleepers over various lines of railways has become one of the great industries and enterprises of the country, contributing, perhaps, as much or more, than any one thing to the convenience and comfort of the travelling public. Indeed, the running of these sleepers has become a business and social necessity. Such being the case, can it be maintained the law imposes no obligations or restrictions on this company in the discharge of its duties to the public? Or, more accurately put, is it true this company owes no duties to the public except such as are due from one mere private person to another? Can it be possible that the common carrier, the ferryman, the innkeeper, and even the blacksmith on the roadside, are all, by reason of the public character of their business, by mere force of law, placed under special obligations and duties to the public which they are bound to observe in the exercise of their respective callings, while, at the same time, this company is entirely relieved from the observance of all such duties and obligations which are not expressly contracted for? We think not. To so hold would be to unjustly discriminate between parties similarly situated, and make the law inconsistent with itself, to the great detriment of the public.

If, then, this company owes any duties to the community by reason of its relation to the public, as we hold it does, manifestly one of them is, that it shall treat all persons whose patronage it has solicited with fairness and without unjust discrimination. When, therefore, a passenger, who, under the rules of the company, is entitled to a berth upon payment of the usual fare, and to whom no personal objection attaches, enters the company's sleeping car at a proper time for the purpose of procuring accommodations, and in an orderly and respectful manner applies for a berth, offering or tendering the customary price therefor, the company is bound to furnish it, provided it has a vacant one at its disposal. To require this of the company is merely exacting of it that which is clearly dictated by the plainest principles of justice and fair dealing. To construe the law otherwise might lead to great abuses and the grossest injustice, detrimental alike to public and private interests. Suppose, for instance, a party who, by reason of advanced age or feeble health, is unable to travel after night except in a sleeper, having an important business engagement at a distant point on a specified day, with a choice of several routes, after having examined the advertisements relating to them makes his selection of the one

line has through sleepers, and accordingly arranges his time of departure so as to reach his destination by travelling day and night. At the appointed time for leaving he provides himself with a first-class ticket over the road and enters the sleeper, where he finds plenty of vacant berths, and asks the conductor to assign him one, tendering the customary price therefor, but the conductor, from some private pique, or from mere wantonness, refuses to let him have one, and by reason of such refusal he is unable to meet his business engagement, whereby he is subjected to great pecuniary loss. Can it be said there is no remedy in such case? Certainly it can, if the law does not, under the circumstances supposed, impose upon the company the duty of furnishing berths when it has them for disposal. But, as we have already seen, such is not the law. Holding then, as we do, where there are sleeping berths not engaged, it is the duty of the company, upon the payment or tender of the customary price, to furnish them to applicants when properly called for by unobjectionable persons, it follows the defendant was not justifiable in refusing to let the plaintiff have one for himself and wife, and it is well settled the fact there was a special contract between the company and the plaintiff, upon which an action of *assumpsit* might have been maintained, does not at all affect the right to recover in the present form of action, which is founded upon the defendant's common law liability, as above stated.

But outside of this view, of the soundness of which we have no doubt, the same result may be reached by a somewhat different process, though the principle, perhaps, is the same in both cases. Let us assume, then, for the purposes of the argument, the defendant owes to the public no common law duties in the absence of any contract relating to its business. It would then follow the defendant is under no obligation to the plaintiff, except such as grew out of the contract entered into between them. But it does not follow that all the duties growing out of the contract on either side must have been expressly stipulated for. On the contrary, nothing is better settled than that in many contracts, especially those which establish peculiar relations between the parties, as, those of confidence and trust, the law silently annexes certain conditions, and imposes mutual obligations and duties, which are not all, in express terms, provided for in the contract, yet, in contemplation of law, they are nevertheless regarded as a part of the contract, and the non-performance of them may, in an action on the contract, be assigned as a breach thereof. But while *assumpsit* will certainly lie for a breach of these implied duties, it is equally well settled that case will lie also. Strictly speaking, these duties arise *ex lege* out of the relation created by the contract. As familiar illustrations of this class of contracts, which give rise to an almost infinite variety of implied duties and obligations, may be mentioned those between client and attorney, physician and patient, carrier and shipper, and,

in short, every species of bailment. In all these and analogous cases it is conceded case is a concurrent remedy with *assumpsit* for a breach of the implied duties growing out of any of these relations.

Now, when we look at the contract between the plaintiff and defendant, the character of the business of the company, the subject matter of the contract, the relations of the parties with respect to such subject matter, and all the circumstances attending the transaction, can it be doubted for a moment, that the contract falls within the same class of contracts as those between carrier and passenger, and the like? Can it be questioned that upon assigning the two berths to the plaintiff upon the terms which he agreed to and offered to comply with, and which the company agreed to accept, the contract thus made at once became obligatory and binding upon the parties, and that it established a special relation between them, such as that between carrier and passenger, and the like, to which the law, of its own force, annexed certain implied obligations and duties, to be respectively observed and performed by the parties towards each other? Clearly not. What were some of these implied duties? On the part of the plaintiff, he impliedly agreed to conduct himself in a quiet and orderly manner, to take due and proper care of the berths while in his possession, and surrender the same at the end of his journey in as good condition as when assigned to him, necessary wear excepted. On the part of the company it was impliedly stipulated that it would use all reasonable and proper means within its power to preserve order and decorum in the sleeper during the journey, and especially during sleeping hours, and that it would furnish and keep on hand such supplies and conveniences as are usually found in like sleepers, and are necessary to the health and comfort of passengers, and also that it would permit the plaintiff to quietly and peaceably occupy the berth engaged by him during the journey, and not expel him or his wife from the car or such berth, or otherwise attempt to interfere with its proper use and enjoyment, so long as he and his wife demeaned themselves with propriety. None of these duties were, or ever are, expressly stipulated for by one engaging a sleeping berth, for the simple reason the law always implies them from the relation of the parties created by the contract securing a berth; and for a breach of any of these implied duties it is clear, as already shown, case is a concurrent remedy with *assumpsit*, and, indeed, is always the more appropriate remedy where matters of aggravation are relied on as an element of damage. It is clear, in the present case, the defendant utterly disregarded its duty in not making up the berth of the plaintiff, and in not permitting him and his wife to occupy it through the night, and in expelling them from the car, and for this it must be held liable.

The view here expressed is believed to be in consonance with the general principles of the law, and is clearly sustained by some of

the last-considered cases, both English and American. Burnett *v.* Lynch, 5 Barn. & Cress. 589; 11 Eng. Com. Law, 597; Hancock *v.* Coffin, 21 Eng. Com. Law, 318; Dickson *v.* Clifton, 2 Wils. 319; Boorman *v.* Brown, 3 Adol. & E. (N. S.) 525. In this last case, Chief Justice Tindal, in delivering the judgment in the Exchequer Chamber, entered into an extended review of the authorities, and in summing up used this language: "The principle in all these cases would seem to be, that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort," — and this case was affirmed on appeal to the House of Lords. 11 Cl. & Fin. 44. In this case, Lord Campbell, in delivering the judgment in the House of Lords, says: "I think the judgment of the Court of Exchequer Chamber is right, for you cannot confine the right of recovery merely to those cases where there is an employment without any special contract. But wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of the duty in the course of that employment the plaintiff may recover, either in tort or in contract." This, subject to the limitation hereafter to be stated, we regard as the true rule on the subject.

It is often, and indeed generally, stated, the action lies only for the breach of the common law duty, and this we believe to be strictly true; yet there is some confusion in the cases as to what is meant by a common law duty, growing out of the fact that it sometimes arises without the intervention of a contract and sometimes with it, and in the latter case it is often said, as in the case last cited, "the contract creates the duty," and while this is true and accurate enough in a certain sense, yet when we attempt to define with precision just when the action will lie and when it will not, the statement is not sufficiently definite, for it must be conceded the law makes it the duty of every one to perform his contract, and it is clear case will not lie for the breach of every duty created by contract. If one contracts to deliver to another a load of wood, or pay a specific sum of money on a given day, and fails to do so, an action on the contract alone will lie, — and yet it is manifest, in the case supposed, there has been a breach of duty created by the contract. We think it more accurate, therefore, to say that case lies only for the breach of such duties as the law implies from the existing relations of the parties, whether such relations have been established with or without the aid of a contract; but if created by contract, it is no objection to the action that the performance of the duty in question has been expressly stipulated for, if it would have existed by reason of such relations without such stipulation. This is well illustrated by the case put in the early part of this opinion, where B let his horse to A, to be kept at a stipulated price per day, and returned on demand. Now, in that case, by the mere delivery of the horse, to be kept at the price agreed upon, the law implied or

imposed the duty of returning him upon demand, without any agreement to that effect, and the duty being thus implied by law, independently of the express stipulation for its performance, case clearly would lie for its breach.

The general principle seems to be this: Where the duty for whose breach the action is brought would not be implied by law by reason of the relations of the parties, whether such relations arose out of a contract or not, and its existence depends solely upon the fact that it has been expressly stipulated for, the remedy is in contract, and not in tort, — when otherwise, case is an appropriate remedy. Of course, *assumpsit* is a concurrent remedy with case, in all cases where there is an express or implied contract.

The judgment of the Appellate Court is reversed, and the cause remanded, with directions to that court to reverse the judgment of the Circuit Court, and remand the cause for further proceedings not inconsistent with the views here expressed.

THE D. R. MARTIN.

11 Blatchf. (U. S. C. C.) 233. 1873.

Hunt, J. On a trial before the district judge, the libellant, David F. Barney, recovered the sum of $1000 as his damages for ejecting him from the steamboat "D. R. Martin," on the morning of October 23, 1871. On an application subsequently made to him, the district judge reduced the recovery to the sum of $500. A careful perusal of all the testimony satisfies me that the libellant was pursuing his business as an express agent on board of the boat, that he persisted in it against the remonstrance of the claimant, and that it was to prevent the transaction of that business by him on board of the boat that he was ejected therefrom by the claimant.

The steamboat company owning this vessel were common carriers between Huntington and New York. They were bound to transport every passenger presenting himself for transportation, who was in a fit condition to travel by such conveyance. They were bound, also, to carry all freight presented to them in a reasonable time before their hours of starting. The capacity of their accommodation was the only limit to their obligation. A public conveyance of this character is not, however, intended as a place for the transaction of the business of the passengers. The suitable carriage of persons or property is the only duty of the common carrier. A steamboat company or a railroad company is not bound to furnish travelling conveniences for those who wish to engage on their vehicles in the business of selling books, papers, or articles of food,

or in the business of receiving and distributing parcels or baggage, nor to permit the transaction of this business in their vehicles, when it interferes with their own interests. If a profit may arise from such business, the benefit of it belongs to the company, and they are entitled to the exclusive use of their vehicles for such purposes. This seems to be clear both upon principle and authority. Story on Bailm., § 591 a; Jencks *v.* Coleman, 2 Sumn., 221 [519]; Burgess *v.* Clements, 4 Maule & S., 306; Fell *v.* Knight, 8 Mees. & W., 269; Commonwealth *v.* Power, 1 Am. R'y Cas., 389. These cases show that the principle thus laid down is true as a general rule. The case of The New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How., 344, shows that it is especially applicable to those seeking to do an express business on such conveyances. It is there held, in substance, that the carrier is liable to the owner for all the goods shipped on a public conveyance by an express company, without regard to any contract to the contrary between the carrier and the express company. Although the carrier may have no custody or control of the goods, he is liable to the owner in case of loss if he allows them to be brought on board. It is the simplest justice that he should be permitted to protect himself by preventing their being brought on board by those having them in charge. This rule would not exclude the transmission, as freight, of any goods or property which the owners or agents should choose to place under the care and control of the carrier.

That persons other than the libellant carried a carpet-bag without charge, or that such bag occasionally contained articles forwarded by a neighbor or procured for a friend, does not affect the carrier's right. The cases where this was proved to have been done were rare and exceptional, and do not appear to have been known to the carrier, nor does it appear that any compensation was paid to the agent. They were neighborly and friendly services, such as people in the country are accustomed to render for each other. But, if the service and the business had been precisely like that of the libellant, the rule would have been the same. The rights of the carrier in respect to A are not gone or impaired for the reason that he waives his rights in respect to B, especially if A be notified that the rights are insisted upon as to him. If Mr. Prime was permitted to carry a bag without charge on the claimant's boat, or to do a limited express business thereon, this gave the libellant no right to do such business, when notified by the carrier that he must refrain from it. A carrier, like all others, may bestow favor where he chooses. Rights, not favors, are the subject of demand by all parties indiscriminately. The incidental benefit arising from the transaction of such business as may be done on board of a boat or on a car belongs to the carrier, and he can allow the privilege to one and exclude from it another, at his pleasure. A steamboat company, or a railroad company, may well allow an individual to open a restaurant

or a bar on their conveyance, or to do the business of boot blacking, or of peddling books and papers. This individual is under their control, subject to their regulation, and the business interferes in no respect with the orderly management of the vehicle. But, if every one that thinks fit can enter upon the performance of these duties, the control of the vehicle and its good management would soon be at an end. The cars or boats are those of the carrier, and, I think, exclusively his, for this purpose. The sale or leasing of these rights to individuals, and the exclusion of others therefrom, come under the head of reasonable regulations, which the courts are bound to enforce. The right of transportation, which belongs to all who desire it, does not carry with it a right of traffic or of business.

It is insisted that the libellant could not legally be ejected from the boat for any offence, or violation of rules, committed on a former occasion. It is insisted, also, that, having purchased a ticket from the agent of the company, his right to a passage was perfect. Neither of these propositions is correct. In Commonwealth *v.* Power, 7 Metc., 596, the passenger had actually purchased his ticket, and the Chief Justice says: "If he, Hall, gave no notice of his intention to enter the car as a passenger, and of his right to do so, and if Power believed that his intention was to violate a reasonable subsisting regulation, then he and his assistants were justified in forcibly removing him from the depot." In Pearson *v.* Duane, 4 Wall., 605, Mr. Justice Davis, in giving the opinion of the court, held the expulsion of Duane to have been illegal, because it was delayed until the vessel had sailed. "But this refusal," he says, "should have preceded the sailing of the ship. After the ship had got to sea, it was too late to take exceptions to the character of a passenger, or to his peculiar position, provided he violated no inflexible rule of the boat in getting on board." The libellant, in this case, refused to give any intimation that he would abandon his trade on board the vessel. The steamboat company, it is evident, were quite willing to carry him and his baggage, and objected only to his persistent attempts to continue his traffic on their boat. He insisted that he had the right to pursue it, and the company resorted to the only means in their power to compel its abandonment, to wit, his removal from the boat. This was done with no unnecessary force, and was accompanied by no indignity. In my opinion, the removal was justified, and the decree must be reversed.

THURSTON v. UNION PACIFIC R. CO.

4 Dillon, U. S. C. C., 321. 1877.

It was alleged, and not denied, that plaintiff had purchased from the road, for fifty cents, a ticket for crossing the river on the transfer train, and that when the train was about starting he attempted to board it, but was prevented. He also purchased, for ninety cents, from the company a ticket good on another road, but was forcibly ejected from the train, and obliged to remain in Omaha several days before he could safely get away, for which he asked $5000 damages. The defendant admitted that the necessary force (but no more) was used to prevent his entering the train. It was claimed that he had been for years a notorious gambler, — a "monteman," so-called, — and was then engaged in travelling on the defendant's road for the purpose of plying that calling, and was about to enter the train for that purpose. This the plaintiff denied. The question was, whether the defendant has the right to exclude gamblers from its trains? Upon this point the charge of the court is given below.

Dundy, J. The railway company is bound, as a common carrier, when not over-crowded, to take all proper persons who may apply for transportation over its line, on their complying with all reasonable rules of the company. But it is not bound to carry all persons at all times, or it might be utterly unable to protect itself from ruin. It would not be obliged to carry one whose ostensible business might be to injure the line; one fleeing from justice; one going upon the train to assault a passenger, commit larceny or robbery, or for interfering with the proper regulations of the company, or for gambling in any form, or committing any crime; nor is it bound to carry persons infected with contagious diseases, to the danger of other passengers. The person must be upon lawful and legitimate business. Hence defendant is not bound to carry persons who travel for the purpose of gambling. As gambling is a crime under the State laws, it is not even necessary for the company to have a rule against it. It [illegible] to furnish facilities for carrying out an unlawful [illegible]. Necessary force may be used to prevent gamblers from entering trains, and if found on them engaged in gambling, and refusing to desist, they may be forcibly expelled.

[illegible] the plaintiff was going upon the train for gambling purposes, or [illegible] from his previous course, the defendant might reasonably infer that such was his purpose, is a question of fact for the jury. If they find such to have been the case, they cannot give judgment for any more than the actual damage sustained.

After the ticket is purchased and paid for, the railroad company can only avoid compliance with its part of the contract by the existence of some legal cause or condition which will excuse it. The company should, in the first case, refuse to sell tickets to persons whom it desires and has the right to exclude from the cars, and should exclude them if they attempt to enter the car without tickets.

If the ticket has been inadvertently sold to such person and the company desires to rescind the contract for transportation, it should tender the return of the money paid for the ticket. If it does not do this, plaintiff may, under any circumstances, recover the amount of his actual damage, viz.: what he paid for the ticket, and, perhaps, necessary expenses of his detention.

In this case the jury rendered a verdict for actual damages ($1.74) and costs, the company not having tendered the money.

Judgment on verdict.

VINTON *v.* MIDDLESEX R. CO.

11 Allen (Mass.), 304. 1865.

Tort against a street railway corporation to recover damages for the act of one of their conductors in expelling the plaintiff from a car in which he was a passenger.

At the trial in the Superior Court, before Morton, J., it appeared that the plaintiff was a passenger in one of the defendant's cars, and was expelled by the conductor. There was no evidence that any rule or regulation had ever been adopted by the defendants, authorizing their conductors to expel passengers for any cause. The defendants introduced evidence tending to show that at the time of the expulsion the plaintiff was intoxicated, and used loud, boisterous, profane and indecent language towards the conductor and attempted to strike him, and that he was therefore expelled. But the evidence on this point was conflicting. There were four women in the car as passengers.

The defendants requested the court to instruct the jury, amongst other things, as follows: "If the jury find that the plaintiff was in the defendants' car in a state of intoxication, so as reasonably to induce the conductor to believe that the plaintiff would be an annoyance to the passengers, or if the plaintiff so conducted, or used boisterous, profane, or indecent language, naturally calculated to annoy the passengers, and persisted in so doing after being requested to be quiet, the conductor would be justified in removing him, using no more violence than was necessary to affect his removal."

The judge declined so to rule, and instructed the jury as follows: "If the plaintiff, by reason of intoxication or otherwise, was, in act

or language, offensive or annoying to the passengers, the conductor had a right to remove him, using reasonable force. If the conductor, in the performance of his service as conductor, forcibly removed the plaintiff without justifiable cause, or if, having justifiable cause, he used unnecessary and unreasonable violence, in kind or degree, in removing him, the defendants are liable."

The jury returned a verdict for the plaintiff, with $1000 damages; and the defendants alleged exceptions.

Bingham, C. J. By the instructions under which this case was submitted to the jury, in connection with the refusal of those which were asked for by the defendants, we are led to infer that the learned judge who presided at the trial was of opinion that the defendants and their duly authorized agents had no legal power or authority to exclude or expel from the vehicles under their charge a passenger whose condition and conduct were such as to give a reasonable ground of belief that his presence and continuance in the vehicle would create inconvenience and disturbance and cause discomfort and annoyance to other passengers. Such certainly were the result and effect of the rule of law laid down for the guidance of the jury at the trial. We are constrained to say that we know of no warrant, either in principle or authority, for putting any such limitation on the right and authority of the defendants as common carriers of passengers, or of their servants acting within the scope of their employment.

It being conceded, as it must be under adjudicated cases, that the defendants, as incident to the business which they carried on, not only had the power but were bound to take all reasonable and proper means to insure the safety and provide for the comfort and convenience of passengers, it follows that they had a right, in the exercise of this authority and duty, to repress and prohibit all disorderly conduct in their vehicles, and to expel or exclude therefrom any person whose conduct or condition was such as to render acts of impropriety, rudeness, indecency or disturbance, either inevitable or probable. Certainly the conductor in charge of the vehicle was not bound to wait until some overt act of violence, profaneness or other misconduct had been committed, to the inconvenience or annoyance of other passengers, before exercising his authority to exclude or expel the offender. The right and power of the defendants and their servants to prevent the occurrence of improper and disorderly conduct in a public vehicle is quite as essential and important as the authority to stop a disturbance or repress acts of violence or breaches of decorum after they have been committed, and the mischief of annoyance and disturbance have been done.

Indeed, if the rule laid down at the trial be correct, then it would follow that passengers in public vehicles must be subjected to a certain amount or degree of discomfort or insult from evil disposed persons before the right to expel them would accrue to a carrier or

his servant. There would be no authority to restrain or prevent profaneness, indecency, or other breaches of decorum in speech or behavior, until it had continued long enough to become manifest to the eyes or ears of other passengers. It is obvious that any such restriction on the operation of the rule of law would greatly diminish its practical value. Nor can we see that there is any good reason for giving so narrow a scope to the authority of carriers of passengers and their agents as was indicated in the rulings at the trial. The only objection suggested is, that it is liable to abuse and may become the instrument of oppression. But the same is true of many other salutary rules of law. The safeguard against an unjust or unauthorized use of the power is to be found in the consideration that it can never be properly exercised except in cases where it can be satisfactorily proved that the condition or conduct of a person was such as to render it reasonably certain that he would occasion discomfort or annoyance to other passengers, if he was admitted into a public vehicle or allowed longer to remain within it.

Exceptions sustained.

JENCKS *v.* COLEMAN.

2 Sumner (U. S. C. C.), 221. 1835.

Case for refusing to take the plaintiff on board of the steamboat "Benjamin Franklin" (of which the defendant was commander) as a passenger from Providence to Newport. Plea, the general issue. The facts, as they appeared at the trial, were substantially as follows: That the plaintiff was the agent of the Tremont line of stages, running between Providence and Boston; that his object was to take passage in the boat to Newport, and then go on board the steamboat "President," on her passage from New York to Providence, on the next morning, for the purpose of soliciting passengers for the Tremont line of stages for Boston. This the proprietors of the "President" and "Benjamin Franklin" had prohibited, and had given notice that they would not permit agents of that line of stages to take passage in their boats for that purpose. The reason assigned for such prohibition was, that it was important for the proprietors of the steamboats, that the passengers from their boats, for Boston, should find, at all times, on their arrival at Providence, an immediate and expeditious passage to Boston. To insure this object, the Citizens' Coach Company had contracted with the steamboat proprietors to carry all the passengers who wished to go, in good carriages, at reasonable expedition and prices; and the commanders of the steamboats were to receive the fare, and make out way-bills of the passengers, for the Citizens' Coach Company. This they

continued to perform. And, in order to counteract the effect of this contract, — which had been offered the Tremont line, and declined, — that line placed an agent on board the boats, to solicit passengers for their coaches; and, on being complained to by the Citizens' Coach Company, the proprietors of the steamboats interdicted such agents from coming on board their boats. And in this instance refused to permit the plaintiff to take passage in the boat for Newport, though he tendered the customary fare.

Story, Circuit Justice (charging jury). There is no doubt that this steamboat is a common carrier of passengers for hire; and, therefore, the defendant, as commander, was bound to take the plaintiff as a passenger on board, if he had suitable accommodations, and there was no reasonable objection to the character or conduct of the plaintiff. The question then really resolves itself into the mere consideration, whether there was, in the present case, upon the facts, a reasonable ground for the refusal. The right of passengers to a passage on board of a steamboat is not an unlimited right. But it is subject to such reasonable regulations as the proprietors may prescribe, for the due accommodation of passengers and for the due arrangements of their business. The proprietors have not only this right, but the farther right to consult and provide for their own interests in the management of such boats, as a common incident to their right of property. They are not bound to admit passengers on board, who refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct; or who make disturbances on board; or whose characters are doubtful, or dissolute, or suspicious; and, *a fortiori*, whose characters are unequivocally bad. Nor are they bound to admit passengers on board whose object is to interfere with the interest or patronage of the proprietors, so as to make the business less lucrative to them. While, therefore, I agree that steamboat proprietors holding themselves out as common carriers are bound to receive passengers on board under ordinary circumstances, I at the same time insist that they may refuse to receive them, if there be a reasonable objection. And as passengers are bound to obey the orders and regulations of the proprietors, unless they are oppressive and grossly unreasonable, whoever goes on board, under ordinary circumstances, impliedly contracts to obey such regulations; and may justly be refused a passage, if he wilfully resists or violates them.

Now, what are the circumstances of the present case? Jencks, the plaintiff, was at the time the known agent of the Tremont line of stage-coaches. The proprietors of the "Benjamin Franklin" had, as he well knew, entered into a contract with the owners of another line (the Citizens' Stage Coach Company) to bring passengers from Boston to Providence, and to carry passengers from Providence to Boston, in connection with and to meet the steamboats plying between New York and Providence, and belonging to the proprietors

of the "Franklin." Such a contract was important, if not indispensable, to secure uniformity, punctuality, and certainty in the carriage of passengers on both routes, and might be material to the interests of the proprietors of those steamboats. Jencks had been in the habit of coming on board these steamboats at Providence, and going therein to Newport; and commonly of coming on board at Newport, and going to Providence, avowedly for the purpose of soliciting passengers for the Tremont line, and thus interfering with the patronage intended to be secured to the Citizens' line by the arrangements made with the steamboat proprietors. He had the fullest notice that the steamboat proprietors had forbidden any person to come on board for such purposes, as incompatible with their interests. At the time when he came on board, as in the declaration mentioned, there was every reason to presume that he was on board for his ordinary purposes as agent. It has been said that the proprietors had no right to inquire into his intent or motives. I cannot admit that point. I think that the proprietors had a right to inquire into such intent and motives; and to act upon the reasonable presumptions, which arose in regard to them. Suppose a known or suspected thief were to come on board; would they not have a right to refuse him a passage? Might they not justly act upon the presumption that his object was unlawful? Suppose a person were to come on board who was habitually drunk, and gross in his behavior, and obscene in his language, so as to be a public annoyance; might not the proprietors refuse to allow him a passage? I think they might, upon the just presumption of what his conduct would be.

It has been said by the learned counsel for the plaintiff that Jencks was going from Providence to Newport, and not coming back; and that in going down there would, from the very nature of the object, be no solicitation of passengers. That does not necessarily follow; for he might be engaged in making preliminary engagements for the return of some of them back again. But, supposing there were no such solicitations, actual or intended, I do not think the case is essentially changed. I think that the proprietors of the steamboats were not bound to take a passenger from Providence to Newport whose object was, as a stationed agent of the Tremont line, thereby to acquire facilities, to enable him successfully to interfere with the interests of these proprietors, or to do them an injury in their business. Let us take the case of a ferryman. Is he bound to carry a passenger across a ferry whose object is to commit a trespass upon his lands? A case still more strongly in point, and which, in my judgment, completely meets the present, is that of an innkeeper. Suppose passengers are accustomed to breakfast, or dine, or sup at his house; and an agent is employed by a rival house, at the distance of a few miles, to decoy the passengers away, the moment they arrive at the inn; is the innkeeper bound to entertain and lodge

such agent, and thereby enable him to accomplish the very objects of his mission, to the injury or ruin of his own interests? I think not. It has been also said that the steamboat proprietors are bound to carry passengers only between Providence and New York, and not to transport them to Boston. Be it so, that they are not absolutely bound. Yet they have a right to make a contract for this latter purpose, if they choose; and especially if it will facilitate the transportation of passengers, and increase the patronage of their steamboats. I do not say that they have a right to act oppressively in such cases. But, certainly, they may in good faith make such contracts to promote their own as well as the public interests.

The only real question, then, in the present case, is whether the conduct of the steamboat proprietors has been reasonable and *bona fide*. They have entered into a contract with the Citizens' line of coaches, to carry all the passengers to and from Boston. Is this contract reasonable in itself; and not designed to create an oppressive and mischievous monopoly? There is no pretence to say that any passenger in the steamboat is bound to go to or from Boston in the Citizens' line. He may act as he pleases. It has been said by the learned counsel for the plaintiff that free competition is best for the public. But that is not the question here. Men may reasonably differ from each other on that point. Neither is the question here whether the contract with the Citizens' line was indispensable or absolutely necessary in order to insure the carriage of passengers to and from Boston. But the true question is, whether the contract is reasonable and proper in itself, and entered into with good faith, and not for the purpose of an oppressive monopoly. If the jury find the contract to be reasonable and proper in itself, and not oppressive, and they believe the purpose of Jencks in going on board was to accomplish the objects of his agency, and in violation of the reasonable regulations of the steamboat proprietors, then their verdict ought to be for the defendant; and otherwise, to be for the plaintiff.

OLD COLONY R. CO. *v.* TRIPP.

147 Mass. 35. 1888.

Tort for obstructing the station grounds of the plaintiff at Brockton. At the trial in the Superior Court, before THOMPSON, J., evidence was introduced tending to prove the following facts.

The plaintiff is a railroad corporation, with all the powers and subject to all the duties of such corporations in this Commonwealth, and Brockton is one of the largest stations upon its road. It had been the practice of the defendant and other owners of job wagons

for several years prior to August 1, 1886, to go to the Brockton station to wait for trains, and to ascertain if the passengers had any baggage or other merchandise for them to carry. The plaintiff, on or about August, 1886, made a contract with the firm of Porter and Sons, of Brockton, to provide means for carrying all baggage and merchandise brought by incoming passengers to such places in the city as they might desire, at their expense. Afterwards, the plaintiff, through its station master at Brockton, and by the order of its general manager, and also of its division superintendent, but not by any by-law or vote of its directors or stockholders, notified the defendant and all other owners of job wagons not to come upon the plaintiff's grounds at Brockton to solicit baggage or merchandise from incoming passengers, and informed them of the contract made with Porter and Sons, but allowed them, however, to come to the station to deliver such bagagge and merchandise, and to take away such as they might have previous orders for. The defendant after receiving this notice continued to come upon the premises, and to solicit baggage and merchandise upon the platform of the station from passengers upon the arrival of trains, and refused to depart therefrom when requested by the plaintiff's agents, though not there to deliver baggage or merchandise for outgoing passengers, or to take it away upon orders received elsewhere.

Upon these facts, the judge ordered a verdict for the plaintiff, and reported the case for the determination of this court. If the verdict was correct, judgment was to be rendered thereon; otherwise, judgment was to be entered for the defendant.

W. Allen, J. Whatever implied license the defendant may have had to enter the plaintiff's close had been revoked by the regulations made by the plaintiff for the management of its business and the use of its property in its business. The defendant entered under a claim of right, and can justify his entry only by showing a right superior to that of the plaintiff. The plaintiff has all the rights of an owner in possession, except such as are inconsistent with the public use for which it holds its franchise; that is, with its duties as a common carrier of persons and merchandise. As concerns the case at bar, the plaintiff is obliged to be a common carrier of passengers. It is its duty to furnish reasonable facilities and accommodations for the use of all persons who seek for transporation over its road. It provided its depot for the use of persons who were transported on its cars to or from the station, and holds it for that use, and it has no right to exclude from it persons seeking access to it for the use for which it was intended and is maintained. It can subject the use to rules and regulations, but by statute, if not by common law, the regulations must be such as to secure reasonable and equal use of the premises to all having such right to use them. See Pub. Sts. c. 112, § 188. Fitchburg Railroad *v.* Gage, 12 Gray, 393. Spofford *v.* Boston & Maine Railroad, 128 Mass. 326.

The station was a passenger station. Passengers taking and leaving the cars at the station, and persons setting down passengers or delivering merchandise or baggage for transportation from the station, or taking up passengers or receiving merchandise that had been transported to the station, had a right to use the station buildings and grounds, superior to the right of the plaintiff to exclusive occupancy. All such persons had business with the plaintiff, which it was bound to attend to in the place and manner which it had provided for all who had like business with it.

The defendant was allowed to use the depot for any business that he had with the plaintiff. But he had no business to transact with the plaintiff. He had no merchandise or baggage to deliver to the plaintiff, or to receive from it. His purpose was to use the depot as a place for soliciting contracts with incoming passengers for the transportation of their baggage. The railroad company may be under obligation to the passenger to see that he has reasonable facilities for procuring transportation for himself and his baggage from the station where his transit ends. What conveniences shall be furnished to passengers within the station for that purpose is a matter wholly between them and the company. The defendant is a stranger both to the plaintiff and to its passengers, and can claim no rights against the plaintiff to the use of its station, either in its own right or in the right of passengers. The fact that he is willing to assume relations with any passenger which will give him relations with the plaintiff involving the right to use the depot, does not establish such relations or such right; and the right of passengers to be solicited by drivers of hacks and job wagons is not such as to give to all such drivers a right to occupy the platforms and depots of railroads. If such right exists, it exists, under the statute, equally for all, and railroad companies are obliged to admit to their depots, not only persons having business there to deliver or receive passengers or merchandise, but all persons seeking such business, and to furnish reasonable and equal facilities and conveniences for all such.

The only case we have seen which seems to lend any countenance to the position that a railroad company has no right to exclude persons from occupying its depots for the purpose of soliciting the patronage of passengers, is Markham *v.* Brown, 8 N. H. 523, in which it was held that an inn-holder had no right to exclude from his inn a stage-driver who entered it to solicit guests to patronize his stage, in opposition to a driver of a rival line, who had been admitted for a like purpose. It was said to rest upon the right of the passengers, rather than that of the driver. However it may be with a guest at an inn, we do not think that passengers in a railroad depot have such possession of or right in the premises as will give to carriers of baggage, soliciting their patronage, an implied license to enter, irrevocable by the railroad company. Barney *v.* Oyster

Bay & Huntington Steamboat Co., 67 N. Y. 301, and Jencks *v.* Coleman, 2 Sumner, 221 [**519**] are cases directly in point. See also Commonwealth *v.* Power, 7 Met. 596, and Harris *v.* Stevens, 31 Vt. 79.

It is argued that the statute gave to the defendant the same right to enter upon and use the buildings and platforms of the plaintiff, which the plaintiff gave to Porter and Sons. The plaintiff made a contract with Porter and Sons to do all the service required by incoming passengers in receiving from the plaintiff and delivering in the town baggage and merchandise brought by them, and prohibited the defendant and all other owners of job wagons from entering the station for the purpose of soliciting from passengers the carriage of their baggage and merchandise, but allowed them to enter for the purpose of delivering baggage or merchandise, or of receiving any for which they had orders. Section 188 of the Pub. Sts. c. 112, is in these words: "Every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents and servants, and of any merchandise and other property upon its railroad, and for the use of its depot and other buildings and grounds; and, at any point where its railroad connects with another railroad, reasonable and equal terms and facilities of interchange." A penalty is prescribed in § 191 for violations of the statute.

The statute, in providing that a railroad corporation shall give to all persons equal facilities for the use of its depots, obviously means a use of right. It does not intend to prescribe who shall have the use of the depot, but to provide that all who have the right to use it shall be furnished by the railroad company with equal conveniences. The statute applies only to relations between railroads as common carriers and their patrons. It does not enact that a license given by a railroad company to a stranger shall be a license to all the world. If a railroad company allows a person to sell refreshments or newspapers in its depots, or to cultivate flowers on its station grounds, the statute does not extend the same right to all persons. If a railroad company, for the convenience of its passengers, allows a baggage expressman to travel in its cars to solicit the carriage of the baggage of passengers, or to keep a stand in its depots for receiving orders from passengers, the statute does not require it to furnish equal facilities and conveniences to all persons. The fact that the defendant, as the owner of a job wagon, is a common carrier, gives him no special right under the statute; it only shows that it is possible for him to perform for passengers the service which he wishes to solicit of them.

The English railway and canal traffic act, 17 & 18 Vict. c. 31, requires every railway and canal company to afford all reasonable facilities for traffic, and provides that "no such company shall make or give any undue or unreasonable preference or advantage to or in

favor of any particular person or company, or any particular description of traffic, in any respect whatsoever." Marriott *v.* London & Southwestern Railway, 1 C. B. (N. S.) 499, was under this statute. The complaint was that the omnibus of Marriott, in which he brought passengers to the railroad, was excluded by the railway company from its station grounds, when other omnibuses which brought passengers were admitted. An injunction was ordered. Bradell *v.* Eastern Counties Railway, 2 C. B. (N. S.) 509, was a complaint under the statute that the railway company refused to allow the complainant to ply for passengers at its station, it having granted the exclusive right of taking up passengers within the station to one Clark. The respondent allowed the complainant's cabs to enter the station for the purpose of putting down passengers, and then required him to leave the yard. An injunction was refused. One ground on which the case was distinguished from Mariott's was, that the complainant was allowed to enter the yard to set down passengers, and was only prohibited from remaining to ply for passengers. See also Painter *v.* London, Brighton, & South Coast Railway, 2 C. B. (N. S.) 702; Barker *v.* Midland Railway, 18 C. B. 46. Besides Marriott's case, *ubi supra*, Palmer *v.* London, Brighton, & South Coast Railway, L. R. 6 C. P. 194, and Parkinson *v.* Great Western Railway, L. R. 6 C. P. 554, are cases in which injunctions were granted under the statute; in the former case, for refusing to admit vans containing goods to the station yard for delivery to the railway company for transportation by it; in the latter case for refusing to deliver at the station, to a carrier authorized to receive them, goods which had been transported on the railroad.

We have not been referred to any decision or dictum in England or in this country, that a common carrier of passengers and their baggage to and from a railroad station has any right, without the consent of the railroad company, to use the grounds, buildings, and platforms of the station for the purpose of soliciting the patronage of passengers, or that a regulation of the company which allows such use by particular persons, and denies it to others, violates any right of the latter. Cases at common law or under statutes to determine whether railroad companies in particular instances gave equal terms and facilities to different parties to whom they furnished transportation, and with whom they dealt as common carriers, have no bearing on the case at bar. The defendant in his business of solicitor of the patronage of passengers held no relations with the plaintiff as a common carrier, and had no right to use its station grounds and buildings. A majority of the court are of the opinion that there should be

Judgment on the verdict.

Field, J. The Chief Justice, Mr. Justice Devens, and myself think that our statutes should receive a different construction from that given to them by a majority of the court. The Pub. Sts. c.

112, sec. 188, provide "that every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents and servants, and of any merchandise and other property upon its railroad, and for the use of its depot and other buildings and grounds; and, at any point where its railroad connects with another railroad, reasonable and equal terms and facilities of interchange." Section 189 of the same chapter provides that "every railroad corporation shall promptly forward merchandise consigned or directed to be sent over another road connecting with its road, according to the directions contained thereon or accompanying the same, and shall not receive and forward over its road merchandise consigned, ordered, or expressly directed to be received and forwarded by a different route." By section 191, a railroad corporation which violates these provisions is liable for all damages sustained by reason of such violation, and to a penalty of two hundred dollars, which may be recovered to the use of the party aggrieved, or to the use of the Commonwealth. These sections are taken from the St. of 1874, c. 372, secs. 138, 139, 141, and the St. of 1880, c. 258.

Section 188 of the Pub. Sts. c. 112 was first enacted by the St. of 1867, c. 339. This section does not, in terms, require that the persons or companies to whom the corporation is required to give "reasonable and equal terms, facilities, and accommodations" shall own the merchandise which is transported, nor is it limited to the delivery of merchandise to be transported by the railroad corporation. In the clause relating to connecting railroads, the section plainly means that railroads shall give to other railroads connecting with them, and shall receive with such other railroads, reasonable and equal terms and facilities of interchange both in delivering passengers and merchandise to, and in receiving them from, the railroads with which they connect. The provision that every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the use of the depot and other buildings and grounds, must include the use of the depot and other buildings and grounds for receiving passengers and merchandise from a railroad at the terminus where the transportation on the railroad ends, as well as for delivering passengers and merchandise to a railroad at the terminus where such transportation begins.

As the last clause of the section makes provision for carriers connecting by railroad, we think that the preceding clause was intended to make provision for other connecting carriers, and to include public or common carriers, as well as private carriers actually employed by passengers or by the owners or consignees of merchandise. Stages and expresses are the only common carriers of passengers and of merchandise to and from many places in the Commonwealth, and in connection with railroads often form a continuous line of trans-

portation. The statute, we think, was intended to prevent unjust discrimination by a railroad corporation between common carriers connecting with it in any manner, and to require that the railroad corporation should furnish to such carriers reasonable and equal terms, facilities, and accommodations in the use of its depot and other buildings and grounds for the interchange of traffic.

A railroad corporation can make reasonable rules and regulations concerning the use of its depot and other buildings and grounds, and can exclude all persons therefrom who have no business with the railroad, and it can probably prohibit all persons from soliciting business for themselves on its premises. Whatever may be its rights to exclude all common carriers of passengers or of merchandise from its depots and grounds who have not an order to enter, given by persons who are or who intend to become passengers, or who own or are entitled to the possession of merchandise which has been or is to be transported, it cannot arbitrarily admit to its depot and grounds one common carrier and exclude all others. The effect of such a regulation would be to enable a railroad corporation largely to control the transportation of passengers and merchandise beyond its own line, and to establish a monopoly not granted by its charter, which might be solely for its own benefit, and not for the benefit of the public. Such a regulation does not give "to all persons or companies reasonable and equal terms, facilities and accommodations . . . for the use of its depot and other buildings and grounds," in the transportation of persons and property. See Parkinson *v.* Great Western Railway, L. R. 6 C. P. 554; Palmer *v.* London, Brighton & South Coast Railway, L. R. 6 C. P. 194; New England Express Company *v.* Maine Central Railroad, 57 Maine, 188.

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3. WHO DEEMED PASSENGERS.

a. *Acceptance.*

BRIEN *v.* BENNETT.

Before Lord Abinger, C. B. 8 Car. & P. 724. 1839.

Case. — The declaration stated that the defendant was the proprietor of an omnibus for carrying passengers from Hammersmith and divers other places to London, and being such owner, the plaintiff at the request of the defendant, "agreed to become and became a passenger by the said omnibus to be safely and securely conveyed" from Hammersmith to London for reasonable fare and reward to the

defendant, "and the defendant then received the plaintiff as such passenger as aforesaid, and thereupon it became and was the duty of the defendant to use due and proper care that the plaintiff should be safely and securely carried and conveyed by the said omnibus," yet the defendant, not regarding his duty, did not use proper care, &c., but on the contrary, neglected it, so that by the negligence of the defendant and his servant in that behalf, "the plaintiff, whilst such passenger as aforesaid," fell from the said omnibus upon the ground, and was greatly hurt, &c. Pleas, 1st, not guilty; 2d, denying that the defendant was the proprietor of the omnibus; 3d, "that the plaintiff did not become a passenger by the said omnibus, nor did the defendant receive him, the plaintiff, as such passenger in manner and form as in the said declaration is alleged" (concluding to the country).

It appeared that the defendant's omnibus was passing on its journey, when the plaintiff, who was a gentleman considerably advanced in years, held up his finger to cause the driver of the omnibus to stop and take him up, and that upon his doing so the driver pulled up, and the conductor opened the omnibus door; and that just as the plaintiff was putting his foot on the step of the omnibus, the driver, supposing that the plaintiff had got into it, drove on, and the plaintiff fell on his face on the ground, and was much hurt.

Platt, for the defendant. I submit that the plaintiff never was a passenger.

Lord ABINGER, C. B. I think that the stopping of the omnibus implies a consent to take the plaintiff as a passenger, and that it is evidence to go to the jury.

Verdict for the plaintiff — Damages £5.

ALLENDER *v.* CHICAGO, ETC., R. CO.

37 Iowa, 264. 1873.

ACTION to recover damages for injuries received by cars on defendant's road.

On the 5th day of November, 1870, the defendant operated a railroad in Jefferson county, and had a depot at Fairfield, which was then the terminal station of the road. About half-past four o'clock in the afternoon of that day plaintiff, a resident of Jefferson county, eighteen years of age, and who had never ridden on the cars, applied at the depot of defendant, in Fairfield, for passage to Acheson, the next station on the road.

She was informed by the ticket agent that the regular train had gone, but that a freight train would leave about 5 o'clock, which would have a car on which she could ride. She informed the agent

that she would rather go on that than wait for the passenger train, and then went to the house of an acquaintance near the depot.

In a short time she returned, went to the door of the ticket office, asked for a ticket, and inquired how long it would be before she could go. The agent informed her that the train would start in about twenty minutes; told her that she could pay her fare to the conductor, and that she had better go and get on the car and be ready. She told the agent that she had never ridden on the cars before, and asked him if they would not back up to the station. He said the regular passenger train did.

The caboose attached to this freight train had seats like a passenger car in one end, the other part being for the conductor and train men. There were steps, a door and a platform at each end, and doors in the side in the part used by the train men.

At the place in question the defendant's road had three tracks. The caboose stood on the track farthest from the depot, and about two hundred and fifty feet north of it. The engine stood up the track still further north. To the rear or south end of the caboose was attached a flat car. The bunter of the flat car was out. About five feet south of the flat car stood a box-car.

The ticket agent went with the plaintiff out on the platform over the first track to the middle track, in view of the caboose car, pointed it out with his finger, and directed her to go to it and get on.

The plaintiff passed north up the track until she came to the south end of the flat car, and then, seeing no means of entering the caboose car, as she supposed, she undertook to pass between the flat car and the box-car, a few feet south of it, hoping to find an opening by which she might enter the car on the other side, first looking up and down the track, and discovering nothing in motion. At this time the brakeman and conductor were engaged in making up the train. Four freight cars detached from the locomotive, the conductor upon them, were very slowly coming down from the north to be attached to the caboose. When they came near the caboose the conductor got off and walked alongside to make the coupling. The concussion was slight, but was sufficient to carry the caboose and flat car far enough back to almost close the space through which the plaintiff was at that moment passing. She was caught between the flat car and the box-car about the hips, and received the injuries for which she sues.

Jury trial. Verdict for plaintiff for $5000. Motion for new trial overruled. Judgment upon the verdict. Defendant appeals.

Day, J. . . . . .

III. The court gave to the jury sixteen instructions, which, in the main, quite fairly present the case. To six of them the defendant makes objection. Some of them are exceptionable because they suggest to the jury matters outside of the evidence produced. The seventh instruction given is as follows: —

"And she may recover not only the amount of damages which she suffered prior to the commencement of this suit, but also all the damages proceeding continuously from the injury complained of, which she had suffered up to the present time, and which it is reasonably certain she will suffer in the future. There must, however, be a reasonable certainty as to such future damages. Yet she cannot recover for the damage which she might have avoided by the exercise of slight care and diligence after she became aware of the injury of which she complains."

This instruction is erroneous. It is the duty of a person placed in the condition of plaintiff to exercise not slight, but reasonable care and diligence to effect a speedy and complete cure. And for injuries or suffering caused or enhanced by the neglect to use such care she cannot recover. Collins *v.* City of Council Bluffs, 32 Iowa, 324.

Evidence was introduced which, appellant claims, shows a failure to exercise such care, as her failure to consult a physician or take medicine after the lapse of about one week from the injury, and her going to work soon after the injury was received.

It was the right of the defendant to have the verdict of the jury as to whether plaintiff exercised ordinary care in the means employed to effect a cure. And we cannot say that it has not been prejudiced by the failure to submit this question under the proper instruction.

For the error in this instruction the cause must be reversed, but as the questions raised in the other instructions complained of, may arise upon the new trial, it is necessary that we should consider and determine them.

Whilst in the main, the instructions given very fairly present the case, yet some of them have objectionable features which should be avoided on the new trial.

The seventh instruction is as follows: —

"If you believe that the plaintiff entered into an office or waiting room provided by defendant for passengers, and informed the depot or ticket agent of her intention and desire to become a passenger; that she placed herself in good faith, under his direction as such; that such agent directed her in getting on (attempting to get on) the car; these facts, if established to your satisfaction by the evidence, would be sufficient to justify you in finding that the relation of passenger existed although she had not purchased a ticket, and had not entered a car." This instruction is not only right in principle, but it is supported by authority.

If the actual purchase of a ticket, or the entering of a car is necessary in order to constitute the relation of a passenger, then no one taking passage on a railway at a way station where no tickets are sold, can demand of the company the exercise of that high degree of care which a common carrier owes a passenger, until he had actually obtained admission to the car. If the doctrine of the instruction be

not right, then a person taking passage at a way station, without the means of procuring a ticket, might be precipitated under the wheels and injured, from a defect in the steps, and yet could demand of the company the exercise of only ordinary care.

The rule given by the court is distinctly recognized in Shearman & Redfield on Negligence, section 262, and cases cited, and we have no doubt of its correctness.

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Reversed.

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b. *Persons pursuing Special Callings.*

NOLTON *v.* WESTERN R. CO.

15 N. Y. 444. 1857.

DEMURRER TO COMPLAINT. The complaint stated that the plaintiff was a mail agent on the defendant's railroad, in the employment of the United States, and the defendant a carrier of passengers and freight, for fare and reward, by railroad and cars, between Greenbush and Boston. That defendant was bound by contract between it and the United States, for a stipulated time and price, to carry the mails, and also the mail agent, without further charge; that in pursuance and in consideration of such contract, the defendant received the plaintiff into a car fitted up for the accommodation of the mail and mail agent; and the plaintiff, for the consideration aforesaid, became and was a passenger in the said cars, to be by the defendant, thereby, safely and with due care and skill, carried and conveyed to Worcester, which the defendant then and there undertook and was bound to do. It then states a bodily injury received by the plaintiff, by the running of the car, containing the plaintiff, off the track, and breaking it, through defectiveness of machinery, want of care, skill, &c. The defendant demurred, and after final judgment for the plaintiff, by the Supreme Court at general term, appealed to this court. The case was submitted on printed briefs.

SELDEN, J. As the only objection which can be taken to the complaint upon this demurrer is, that it does not contain facts sufficient to constitute a cause of action, it is entirely immaterial whether the action be considered as in form *ex contractu* or *ex delicto*. The only question is whether, upon the facts stated, the plaintiff can maintain an action in any form.

The plaintiff cannot, I think, avail himself of the contract between the defendant and the government, so as to make that the foundation of his complaint, and the foundation of a recovery. This is not like the cases in which a third person has been permitted to

recover upon a contract made by another party for his own benefit. The distinction between them is plain. Those were cases where the defendant, for a consideration, received from the party to the contract, had undertaken to do something ostensibly and avowedly, for the direct benefit of the plaintiff, and when the advantage to the latter was one object of the agreement. Here the parties had no such intention. In contracting for the transportation of the mail agent, the parties had no more in view any benefit or advantage to him, than if the contract had been to transport a chattel. The government took care of the public interests, and left those of the mail agent to such protection as the law would afford.

Another distinction is, that in the cases referred to, the party claiming the benefit of the contract and seeking to enforce it, was one who was specifically mentioned and pointed out in the contract itself, while here no one is designated; and to entitle the plaintiff to recover upon it, it must be regarded as a shifting contract, which can be made to enure to the benefit of any person who may temporarily assume the duties of mail agent. I think there is no precedent for such a construction of such a contract.

If, then, the plaintiff can recover at all, it must be upon the ground of some implied contract, or of some legal obligation or duty resting upon the defendants, to exercise proper care and skill in the transportation of passengers, and the question is, whether, under the circumstances of this case, such a contract is implied, or such a duty imposed for the benefit of the plaintiff.

It would seem a startling proposition, that in all those cases where persons travel upon railroads engaged not in their own business, but that of others, and where their fare is paid by their employer, they are entirely at the mercy of the railroad agents, and without redress, if injured through their recklessness and want of care and skill. If, however, railroad companies are liable, in cases like the present, it is important to ascertain the precise nature and extent of that liability.

In the first place, then, it is clear that they are not liable, by virtue of that custom or rule of the common law which imposes special and peculiar obligations upon common carriers. Persons engaged in the conveyance of passengers are not common carriers within the meaning of that rule, which applies solely to those whose business it is to transport goods. Bac. Abr., tit. carriers; 2 Kent's Com., § 40; Story on Bail., § 498, and note.

If the complaint in this case, after stating that the defendant was a carrier of passengers and freight from Greenbush to Boston, for hire and reward, had simply averred that the plaintiff became a passenger in the cars of the defendant, and was so received by it; an implied contract would have arisen on the part of the defendant, to transport the plaintiff, with all due diligence and skill; because the law would have inferred from those facts that the defendant

was to receive a compensation from the plaintiff himself. But this inference is repelled by the contract set forth, and the statement that the plaintiff was received as a passenger under it.

It was suggested by the plaintiff's counsel, upon the argument, that a contract might be implied, of which the agreement between the defendant and the government should form the consideration and basis. But although that agreement may be resorted to, for the purpose of showing that the plaintiff became a passenger upon the cars by the consent of the defendant, and not as a mere intruder, it cannot, I think, be made available by the plaintiff, as the consideration of an implied *assumpsit*. As to him, that agreement is *res inter alios acta*. He is not a party to it or mentioned in it. His employment by the government may have taken place long after the agreement was made, and have had no reference to it. If any contract can be implied from that agreement, in favor of the plaintiff, it must be a contract to transport him from place to place, according to the terms of the agreement. Suppose, then, the cause of action, instead of being for an injury received through the negligence of the defendant, had been for not furnishing the necessary cars, or not running any train, could the plaintiff recover in such an action? Would the defendant be liable for its failure to perform the contract, not only to the party with whom the contract was made, and from whom the consideration was received, but to a third party not named in it, and from whom they had received nothing? No one would claim this.

It may be said that the implied contract with the plaintiff is limited to an undertaking to transport safely or with due care. It is difficult to see, however, how there can be a contract to transport safely where there is no contract to transport at all. My conclusion therefore is, that this action cannot be maintained upon the basis of a contract express or implied.

It necessarily follows that it must rest exclusively upon that obligation which the law always imposes upon every one who attempts to do anything, even gratuitously, for another, to exercise some degree of care and skill in the performance of what he has undertaken. The leading case on this subject is that of Coggs *v.* Bernard, Ld. Ray. 909. There the defendant had undertaken to take several hogsheads of brandy belonging to the plaintiff, from one cellar in London, and to deposit it in another; and in the process of moving one of the hogsheads was staved and the brandy lost, through the carelessness of the defendant or his servants. Although it did not appear that the defendant was to receive anything for his services, he was, nevertheless, held liable by the whole court.

The principle of this case has never since been doubted, but there has been some confusion in the subsequent cases as to the true nature of the obligation, and as to the form of the remedy for its violation. In many instances suits have been brought, upon the

supposition that an implied contract arises, in all such cases, that the party will exercise due care and diligence; and the language of Lord Holt, in Coggs *v.* Bernard, undoubtedly gives countenance to this idea. He seems to treat the trust and confidence reposed as a sufficient consideration to support a promise. This doctrine, however, can hardly be considered as in consonance with the general principles of the common law. In addition to the difficulty of bringing mere trust and confidence within any legal definition of valuable consideration there is a manifest incongruity in raising a contract, to do with care and skill that which the party is under no legal obligation to do at all.

The duty arises in such cases, I apprehend, entirely independent of any contract, either expressed or implied. The principle upon which a party is held responsible for its violation does not differ very essentially, in its nature, from that which imposes a liability upon the owner of a dangerous animal, who carelessly suffers such animal to run at large, by means of which another sustains injury; or upon one who digs a ditch for some lawful purpose in a highway, and carelessly leaves it uncovered at night, to the injury of some traveller upon the road. It is true, it may be said that, in these cases, the duty is to the public, while in the present case, if it exists at all it is to the individual; but the basis of the liability is the same in both cases, viz., the culpable negligence of the party. All actions for negligence presuppose some obligation or duty violated. Mere negligence, where there was no legal obligation to use care, as where a man digs a pit upon his own land, and carelessly leaves it open, affords no ground of action. But where there is anything in the circumstances to create a duty, either to an individual or the public, any neglect to perform that duty, from which injury arises, is actionable.

The present case falls clearly within this principle of liability. There can be no material difference between a gratuitous undertaking to transport property, and a similar undertaking to transport a person. If either are injured through the culpable carelessness of the carrier, he is liable. If, according to the case of Coggs *v.* Bernard, *supra*, and the subsequent cases, an obligation to exercise care arises in one case, it must also in the other.

It is true that, according to the authorities, the party in such cases is only liable for gross negligence. But what will amount to gross negligence depends upon the special circumstances of each case. It has been held that, when the condition of the party charged is such as to imply peculiar knowledge and skill, the omission to exercise such skill is equivalent to gross negligence. Thus, it was said by Lord Loughborough, in Shiells *v.* Blackburne, 1 Hen. Bl. 158, that "if a man *gratuitously* undertakes to do a thing to the best of his skill, when his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence."

The same doctrine is advanced by Park, B., in Wilson *v.* Brett, 11 Mees. & Wels. 113. He says: "In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it."

I regard this principle as peculiarly applicable to railroad companies in view of the magnitude of the interests which depend upon the skill of their agents, and of the utter powerlessness of those who trust to that skill to provide for their own security.

This case is not like that of Winterbottom *v.* Wright, 10 Mees. & Wels. 109. There the defendant had not undertaken to transport the plaintiff, either gratuitously or otherwise. He was simply bound by contract with the government to furnish and keep in repair the carriages used by the latter in transporting the mails. The relations of the parties in that case and in this are very different, and the cases cannot be considered as governed by the same principles.

I entertain no doubt that in all cases where a railroad company voluntarily undertakes to convey a passenger upon their road, whether with or without compensation, in the absence, at least, of an express agreement exempting it from responsibility, if such passenger is injured by the culpable negligence or want of skill of the agents of the company, the latter is liable. The matter of compensation may have a bearing upon the degree of negligence for which the company is liable. That question, however, does not arise here. Degrees of negligence are matters of proof, and not of averment. The allegations of negligence in this complaint are sufficient whether the defendant is liable for ordinary or only for gross negligence.

The judgment should be affirmed.

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c. *Employees.*

GILLSHANNON *v.* STONY BROOK R. CO.

10 Cush. (Mass.) 228. 1852.

Action on the case for injuries sustained by the plaintiff, a laborer in the employment of the defendants, by the negligence of their servants and agents. It was tried in this court before Bigelow, J., by whom the evidence was reported for the consideration of the whole court. From this evidence it appeared that the plaintiff was a common laborer, employed in repairing the defendant's road bed, at a place several miles from his residence. Each morning and

evening he rode with other laborers, to and from the place of labor on the gravel train of the defendants. This was done with the consent of the company, and for mutual convenience; no compensation being paid, directly or indirectly by the laborers, for the passage, and the company being under no contract to convey the laborers to and from their work.

While thus on the way to their work on one occasion, a collision took place with a hand-car on the track, through the negligence of those having charge of the gravel train, as the plaintiff contended, and he was thrown off and run over by the gravel train, for which injury this action was brought. The plaintiff had no charge or care over the gravel train, and there was some evidence that the gravel train was not sufficiently supplied with brakemen. If, upon these facts, the jury would be justified in finding a verdict for the plaintiff, the case was to stand for trial; otherwise the plaintiff to become nonsuit.

Dewey, J. If the relation existing between these parties was that of master and servant, no action will lie against the defendants for an injury received by the plaintiff in the course of that service occasioned by the negligence of a fellow-servant. Farwell *v.* Boston and Worcester Railroad, 4 Met. 49; Hayes *v.* Western Railroad, 3 Cush. 270.

It was attempted on the argument for the plaintiff to take the case out of the rule stated in those cases, upon the ground that the nature of the employment of these servants was different, the plaintiff being employed as a laborer in constructing the railroad bed, and not engaged in any duty connected with running the trains, and so not engaged in any common enterprise. The case of Albro *v.* Agawam Canal Co., 6 Cush. 75, seems to be adverse to these views, and goes strongly to sustain the defence.

It was also urged that the plaintiff was not in the employment of the defendants at the time the injury was received, or that he might properly be considered as a passenger, and the defendants, as respects him, were carriers for hire. But as it seems to us, in no view of the case can this action be maintained. If the plaintiff was by the contract of service to be carried by the defendants to the place for his labor, then the injury was received while engaged in the service for which he was employed, and so falls within the ordinary cases of servants sustaining an injury from the negligence of other servants. If it be not properly inferable from the evidence that the contract between the parties actually embraced this transportation to the place of labor, it leaves the case to stand as a permissive privilege granted to the plaintiff, of which he availed himself, to facilitate his labors and service, and is equally connected with it, and the relation of master and servant, and therefore furnishes no ground for maintaining this action.

How does the case differ from that suggested at the argument by

the counsel for the defendants, who supposed a case where the business for which the party is employed is that of cutting timber, or handling wood, and the servant receives an injury in his person on the way to the timber-lot, by the overturning of the vehicle in which he is carried, by the negligence or careless driving of another servant? There is no liability on the part of the master in such a case.

It seems to the court, that upon the evidence offered in the present case, the plaintiff was not entitled to a verdict, and the nonsuit should stand.

Plaintiff nonsuit.

RYAN *v.* CUMBERLAND VALLEY R. CO.

23 Penn. St. 384. 1854.

Action on the case by John Ryan against the company for damages occasioned by the breaking of his arm while in the employment of the company, and through the carelessness of their agents.

The plaintiff, with many others, was employed by the defendants to make repairs on their road, and the work was carried on partly by means of a train of gravel cars, made to dump to either side, and moved by locomotive power. He was a common laborer, employed in digging, and in filling the cars, and in such like work; and as the hands boarded in Chambersburg, about four miles distant from their principal work, it was usual for them to ride to and from their work in gravel cars. While the plaintiff and others were thus going to their work, October 28, 1850, at railroad speed, the accident complained of happened by the dumping of one of the cars, which seems not to have been hooked, and throwing the plaintiff out upon the road. It is charged that it was the duty of the defendants by their engineer or conductor to see that all the cars were safe before starting.

The court below (Kimmel, P. J.) instructed the jury that under such circumstances the plaintiff had no right to recover, and hence this writ of error.

Lowrie, J. The nature of the case requires the admission that it was the understanding of the parties that the hands were to ride on the gravel train to and from their work and at their work, and the plaintiff is entitled to use this fact as a part of his case. He cannot, however, use it as presenting the whole of the relation between him and the defendants. He was not a mere passenger on the defendant's cars; because his travel upon them was really an incident of a different relation, that of a servant, and this is the character in which we must regard him here. He was no more a passenger than is the coachman, or wagoner, or carter, who is in the

employment of another. He was simply a servant, with the privilege of riding, as part of his business, in the gravel train, which was one of the instruments of his work. He could not and does not sue on a contract as a passenger, for that was not his relation; but he does sue on his true relation, as a servant injured by the carelessness of his fellow-servants.

The plaintiff seeks to strengthen his position by the allegation and by evidence that it was the duty of the engineer to see that all the cars were safely hooked before starting the train, and that his neglect in this respect is chargeable to the company. As a matter of fact, this does not seem probable; yet we must examine its influence, as if it might be proved.

This alleged duty did not grow out of any contract between the plaintiff and the defendants, else the contract would have been charged as an essential and relevant bond of their relation, which has not been done. If it was a duty which the engineer owed to the plaintiff in any way, then the action ought to be against him for the breach of it. If he owed it to the defendants, then they alone can complain of its non-performance.

The duty must therefore be alleged as that of the defendants to the plaintiff. In what form shall we put it, or how shall we define it? Is it that, when persons are employed to work for others, the employers are bound to see that the instruments of their work are and shall continue in a condition to be used with safety? Then the coachman, the wagoner, and the carter, who ought to know more about the vehicles which they use than their employers do, have a practical warranty that they are in good order, though practically we know that many of them are nearly worn out; the wood-chopper and the grubber are insured that their axe or mattock shall not injure them by flying off the handle; the engineer, the miller, the cotton-spinner, and the wool-carder have a guaranty for the accidents that may befall them in the use of the machinery which they profess to understand, and which they ought so to understand as to be able to inform their employers when it is out of order.

If this be so, then the care and skill required of workmen is reduced very much below what is ordinarily expected of them. If there be any distinction between any of the cases put and the one in hand, it is too narrow to be made the foundation of a new rule or to cancel the force of the analogy which they afford. Certainly such a duty has never been considered as belonging to these relations, and therefore it cannot be law.

The only way left for defining the supposed duty is to allege that employers are liable when any of those employed by them are injured by the carelessness of their fellow-laborers. Though this proposition has never been decided upon by this court, it has often been considered elsewhere and decided in the negative, and we know but one case that seems to affirm it: 20 Ohio Rep. 415.

It has been decided in the negative in cases relating to those employed in running railroad cars: 1 McMullan, 385; 3 Cush. 270; 4 Mcl. 49; 5 Exch. Rep. 343; 6 Barb. R. (Sup. C.) 231; 15 *id.* 574; in navigating vessels, 2 Richardson, 455; in driving a wagon, 3 Moo. & W. 1; in building, 5 Exch. R. 354, 6 Hill, 592; and in factories, 6 Cush. 75. And such is the rule even when the careless one is the superior of the other, or has a special duty to perform upon which the safety of the others depends. Where we find a road is so well beaten, it is easy to follow it, and its beaten character is an indication that we may follow it with safety. We shall trust to this indication, sustained, as it is, by reasons which have been so fully expressed by others that we can do little else than repeat them.

The rule announced by these cases is, that where several persons are employed in the same general service, and one is injured from the carelessness of another, the employer is not responsible.

On what principle can a contrary rule be founded? The maxim, *sic utere tuo ut alienum non lædas*, does not apply; for that is the most general of all rules, intended to define the duties of those who have no other relation than contiguity and a common humanity. It is intended as the general rule, defining the general relation of man in society, and not any of the special relations, which must have their own rules, depending upon their special character. Our question is, therefore, reduced to this: What is there in the special relation of master and servant from which a contrary rule can be deduced?

With us this relation is always instituted by a contract, and to that we must look for the principal terms by which it is defined. The contract defines the duty of each party; and as we do not find that the duty which is now insisted on was made a part of the contract, we infer that it has no existence.

But it must be conceded that many of the relations of life are instituted in the most general terms, and that the special duties of each party are so well understood in society that they are left entirely undefined in the contract, and each is presumed to have undertaken them without their being formally specified. Certainly no one will pretend that the duty here insisted upon has, in this way, become part of this contract; for no one so understands it, and no one would so contract if requested.

There is, therefore, no way left but to allege that the law has made it a duty of a master to see that his servants do not injure each other by their carelessness. There is no statute of this purport; and therefore the allegation must be that it is a part of the common law. But the common law consists of the general customs of the people, and of the maxims and principles on which they act; and it is conclusive against the rule contended for that it has never been found among these, and is not deducible from them.

But the duty insisted upon is substantially one of protection which cannot exist without implying the correlative one of depen-

dence or subjection. The relations of husband and wife, parent and child, are in law relations of protection and dependence; and there are those which are so in fact, as where a weak-minded person submits himself to the direction of another; and here the law interferes to protect against an undue exercise of influence and power. And there are others, as the Sunday laws and the laws regulating the hours of labor in particular occupations, whereby the law protects men against the danger arising from undue competition; but the strictness used in defining this relation, as belonging to special cases, implies that it has no wider existence.

There is no relation of protection and dependence between master and servant, or of confidence in the institution of the relation; we speak not of master and apprentice. The servant is no Roman client or feudal villein, with a lord to protect him. Both are equal before the law, and considered equally competent to take care of themselves, and very often the servant is the more intelligent of the two.

The argument that the law implies a warranty that one servant shall not be injured by the carelessness of another is only another way of stating the proposition that the law imposes the duty of protection; and it must be set aside by the same answer.

And what would be the value of such a rule? If it exists at all, it must grow out of the relation and affect all persons standing in it; and this would change all our ideas concerning the relation of master and servant. Every man must have his own business, whether as master or as servant, and there is no business without its risks. Where many servants are employed in the same business, the liability to injury from the carelessness of their fellows is but an ordinary risk, against which the law furnishes no protection but by an action against the actual wrongdoer. It would violate the law of nature if it should provide an immunity to any one against the ordinary dangers of his business, and it would be treating him as incapable of taking care of himself.

If we declare that workmen are warranted against such carelessness, then the law places all careless men, which means all badly educated or badly trained men, and it places even those who have not acquired a reputation for care, under the ban of at least a partial exclusion from all work. And this is the ordinary result of all undue attempts to protect by law one class of citizens against another. It is done at a practical sacrifice of liberty on the part of those intended to be protected, and to the embarrassment of the common business of life, by imposing upon the people a rule of a new and unusual character which may require half a century to become fitted like a custom, and adapted to the customs already existing, which it does not have the effect of annulling.

If this were the rule, it would embarrass the conduct of all business, where any risk is to be run. How could a sailor be ordered

aloft in a storm, without the employers being liable to the charge that the captain had shown want of proper skill and care in giving such an order in the circumstances? How could the wearied laborer be allowed to ride home with the driver, without danger that the employer should be called to account for an accidental tilting of the cart?

And such a rule could have very little application to great corporations, for they would immediately act on the maxim, *conventio vincit legem*, and provide against it in their contracts. But it would have to embarrass the more private and customary relations, and be the source of abundant litigation.

The court below decided rightly that the rule contended for has no existence.

Judgment affirmed.

Lewis, J., and Knox, J., dissented.

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d. *For Compensation.*

TARBELL *v.* CENTRAL PACIFIC R. CO.

34 Cal. 616. 1868.

[Action to recover damages for wrongful ejection from train.]

On the trial, which was by the court with a jury, plaintiff proved (the defendant objecting and excepting thereto for irrelevancy and incompetency) that while on the defendant's moving train of passenger cars, at a point about five miles from Auburn, towards Colfax, he having entered the train at Auburn, he tendered to the conductor of the train, upon the usual demand being made of him for his ticket or fare, the legal passenger fare chargeable between the Auburn and Colfax railroad stations, in the legal tender notes of the United States. The conductor refused to accept the payment so tendered, and demanded that it be made in the gold or silver coin of the United States, and on the failure and refusal of plaintiff to make the payment as required, caused the train to be stopped and plaintiff to be ejected therefrom. Plaintiff had a verdict and judgment for five hundred dollars damages. The defendant moved for a new trial upon a settled statement of the evidence and rulings of the court on demurrer and the admission of evidence, on grounds of alleged error in law occurring at the trial, that the verdict and judgment were against law, and that the verdict was excessive. The motion was denied, and defendant appealed from the judgment and the order of the court denying a new trial.

SANDERSON, J. In actions of this character it is not necessary that the plaintiff should allege a strictly legal tender of his fare. It was so held in the case of Pickford *v.* The Grand Junction Railway Company, 8 M. & Wels. 372. It is sufficient to allege that he was ready and willing, and offered to pay the defendant such sum of money as it was legally entitled to charge. The transportation and payment of the fare are contemporaneous acts. If the plaintiff was ready and willing, and offered to pay the legal fare when demanded by the conductor of the train, the defendant was bound to carry him, provided there was room in the cars and the plaintiff was a fit person to be admitted. This results from the nature of the defendant's business, which makes it its duty to receive all persons as passengers who offer to become such, upon their offering to pay the legal fare. Whenever the performance of a duty or obligation is thus cast upon the one party in consequence of a contemporaneous act of payment by the other, it is sufficient if the latter is ready and willing to pay when the former is ready to undertake the duty. Rawson *v.* Johnson, 1 East, 203.

The complaint in this case might have been drawn with more directness and precision in this respect, but we are disposed to hold that the court below did not err in overruling the demurrer. It would have been more certain had the amount of the fare been stated which the plaintiff offered to pay, and that the person to whom the offer was made was the conductor in charge of the train; but we are not prepared to say it is not sufficiently certain in its present form.

The point that the defendant was not bound to carry the plaintiff because the fare which he offered to pay was in legal tender notes, is not tenable. Conceding that a statute authorizing defendant to demand coin in payment of fare would be constitutional, no such statute exists, and there being no contract in writing stipulating for coin, we find nothing in the case which takes it out of the operation of the Act of Congress in relation to legal tender notes. Railroad fares are not taxes, and do not fall within the rule in Perry *v.* Washburn, 20 Cal. 318.

Whether the defendant could have legally exacted payment in coin before the plaintiff was admitted into the cars and the journey commenced, is a question not involved in this case, and upon which we express no opinion. Having received the plaintiff and proceeded several miles upon the journey, the defendant must be held to have consented to receive in payment of the fare any good and lawful money which the plaintiff might tender when called upon for payment. The kind of money to be paid had then ceased to be an open question, for the contract was already made, and in process of performance.

The verdict, however, was excessive. No special damages were alleged or proved. It is not pretended that this is a case for punitive damages, or that the business of the plaintiff suffered in any

way by reason of his not being taken to Colfax. It does not appear whether the plaintiff proceeded on to Colfax or returned to Auburn after he was put out of the cars, or, whichever he did, if he did either, that he was put to any expense in doing it. Whether the plaintiff was going to Colfax upon urgent business or merely for pleasure is not shown. In short, there is no evidence in the transcript which has any bearing upon the question of damages except the naked fact that he was put out of the cars at a point ten or twelve miles from the place of his destination, and about five from the place of his departure. Such being the only evidence bearing upon the question, we think the verdict greatly disproportionate to the injury proved, within the rule in Aldrich *v.* Palmer, 24 Cal. 513.

A new trial must be granted, unless the plaintiff elects, within fifteen days, to take a judgment for one hundred dollars, which sum we think amply sufficient compensation for the injury which he sustained.

WILTON *v.* MIDDLESEX R. CO.

107 Mass. 108. 1871.

Tort for personal injuries alleged to have been sustained by the plaintiff through the negligence of defendant's servant. Defendant was a street railroad corporation.

At the trial, the plaintiff offered to prove "that on July 16, 1868, at which time she was nine years of age, she went out about seven o'clock in the evening to walk; that she was in company with four or five other girls, on the Charlestown bridge, and near the draw, and one of the defendant's cars came along very slowly; that there were no passengers on the platform, and the driver beckoned to the girls to get on, and they accordingly got on the platform, while the car was going slowly; that the driver then struck his horses, and they started on a fast trot; that the plaintiff had one foot on the step, and by reason of the sudden start lost her balance; that she called to the driver to stop, but the car kept on, and she fell so that one of the wheels passed over her arm, and she was obliged to have it amputated; and that she used due care and the driver was careless." It was admitted that the driver had no authority, unless implied from his position, to invite persons to ride free, and that defendant was not a passenger for hire. Upon the plaintiff's offer of proof, the case was reserved for the consideration of the full court; if the plaintiff was entitled to recover thereon, the case to stand for trial; otherwise, judgment to be given for the defendant.

Morton, J. The plaintiff was injured while riding upon one of the defendant's cars. At the trial she offered to prove that she was

in the exercise of due care, and that the driver of the car was careless. For the purposes of this hearing, therefore, we are to assume that she was injured by the negligence of a servant of the defendants, in the course of his employment; and that her own want of care did not contribute to the injury. It follows, that she can maintain this action; unless we sustain the position taken by the defendants, that she was unlawfully upon the car, and, therefore, not entitled to recover.

The facts which the plaintiff offered to prove, bearing upon this question, are as follows: The plaintiff, a girl of nine years of age, was walking with several other girls upon the Charlestown bridge, about seven o'clock in an evening in July. One of the defendant's cars came along very slowly, and the driver beckoned to the girls to get on. They thereupon got upon the front platform. It was admitted that the plaintiff was not a passenger for hire, and that the driver had no authority to take the girls upon the car and carry them, unless such authority is to be implied by the fact of his employment as a driver.

Upon these facts, it is clear that it would be competent for the jury to find that the beckoning by the driver was intended and understood as an invitation to the plaintiff to get upon the car and ride. In accepting this invitation and getting upon the car, we think she was not a trespasser, there being no evidence of collusion between her and the driver to defraud the corporation.

A master is bound by the acts of his servants in the course of his employment. They are deemed to be the acts of the master. Ramsden *v.* Boston & Albany Railroad Co., 104 Mass. 117, and cases cited. The driver of a horse-car is an agent of the corporation, having charge, in part, of the car. If, in violation of his instructions, he permits persons to ride without pay, he is guilty of a breach of his duty as a servant. Such act is not one outside of his duties, but is an act within the general scope of his agency, for which he is responsible to his master. In the case at bar, the invitation to the plaintiff to ride was an act within the general scope of the driver's employment, and if she accepted it innocently she was not a trespasser. It is immaterial that the driver was acting contrary to his instructions.

It follows, that the plaintiff being lawfully upon the car, though she was a passenger without hire, is entitled to recover, if she proves that she was using due care at the time of the injury and that she was injured by the negligence of the driver. Philadelphia & Reading Railroad Co. *v.* Derby, 14 How. 468, 483.

In the present aspect of the case, we are not called upon to consider to what extent the defendants might be held liable if it were shown that the plaintiff was unlawfully riding upon the car.

Case to stand for trial.

WATERBURY *v.* NEW YORK CENTRAL, ETC., R. CO.

17 Fed. Rep. (U. S. C. C.) 671. 1883.

WALLACE, J. The plaintiff sued for personal injuries sustained, as he alleged, by the negligence of the defendant, and, having recovered a verdict, the defendant moves for a new trial. The plaintiff was riding on an engine of the defendant, when, in consequence of a misplaced switch, it was thrown from the track, and he was injured. There was no evidence on the trial of any express contract between the parties creating the relation of passenger and carrier, but it appeared that on various prior occasions the plaintiff and other drovers whose cattle were being transferred from West Albany to East Albany by the defendant, had been permitted by the employees of the defendant to accompany their cattle by the same train, — sometimes on the cars of the cattle train, and sometimes on the engine. At times the trains were delayed between these points and the cattle required attention, and as no employee of the defendant was assigned to the duty of looking after the cattle, it seemed to be assumed between the employees of the defendant and the drovers that the latter should look after their own cattle. Upon the occasion in question the plaintiff and another drover got upon the engine, there being none but box-cars on the train. The engineer inquired if they had cattle on the train, and being informed that such was the fact, made no objection to their riding upon the engine. It was shown for the defendant that its rules for the government of its employees forbade them from permitting any person to ride upon the engine.

At the trial it was left to the jury to determine as questions of fact whether the plaintiff was a trespasser or a passenger; whether there was negligence on the part of the defendant; and whether there was contributory negligence on the part of the plaintiff. The jury were instructed in substance that if the plaintiff knew he was riding upon the engine in contravention of the rules of the defendant he was a trespasser, and in that case the defendant was not responsible for the injury. They were also instructed that if they found he was riding upon the engine pursuant to an implied understanding between himself and the defendant that he should accompany his cattle in order to take care of them on the way, he was a passenger, and that if he was a passenger, and entitled to accommodations as such, the defendant was not at liberty to assert that he was guilty of negligence in riding upon the engine, if the defendant had provided no safer place for him to ride.

A careful examination of the evidence shows quite satisfactorily that the case did not justify the assumption in any aspect of it that

the plaintiff was entitled to be carried as a passenger, as an implied condition of the contract to carry his cattle. The most that can be fairly claimed for the plaintiff upon the evidence is that he was riding upon the engine permissively. If he was riding there with the consent of the defendant, express or implied, it is not material, so far as it affects the defendant's liability for negligence, whether he was there as a matter of right or a matter of favor, — as a passenger or a mere licensee. It suffices to enable him to maintain an action for negligence if he was being carried by the defendant voluntarily. If the defendant undertook to carry him, although gratuitously, and as a mere matter of favor to himself, it was obligated to exercise due care for his safety in performing the undertaking it had voluntarily assumed. Philadelphia, &c., R. Co. *v.* Derby, 14 How. 468; Steamboat New World *v.* King, 16 How. 469 [**572**]. The carrier does not, by consenting to carry a person gratuitously, relieve himself of responsibility for negligence. When the assent to his riding free has been legally and properly given, the person carried is entitled to the same degree of care as if he paid his fare. Todd *v.* Old Colony, &c., R. Co. 3 Allen, 18. As is tersely stated by Blackburn, J., in Austin *v.* Great Western Ry. Co. 15 Weekly Rep. 863, "the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but the fact of his being there creates a duty on the part of the company to carry him safely."

The real question in the case was lost sight of upon the trial. That question was whether the plaintiff was being carried upon the engine with the consent of the defendant, or only by the unauthorized permission or invitation of the defendant's employees. This question was not presented by the exceptions to the charge or by the instructions which the court was asked to give to the jury. But upon the theory on which the case was presented the jury must have found that the plaintiff had a right to be carried by the defendant as an implied condition of the contract for the transportation of his cattle. As the evidence does not warrant such a conclusion, and as the real question in the case has not been passed upon by the jury, there should be a new trial upon the ground of misdirection, although the defendant's exceptions do not reach the error.

It should have been left to the jury to determine, as a question of fact, whether the defendant had by its conduct held out its employees to the plaintiff as authorized, under the circumstances, to consent to his being carried on the train with his cattle. Undoubtedly the presumption of law is that persons riding upon trains of a railroad carrier, which are palpably not designed for the transportation of persons, are not lawfully there; and if they are permitted to be there by the consent of the carrier's employees, the presumption is against the authority of the employees to bind the carrier by such consent.

In Eaton *v.* D., L. & W. R. Co., 57 N. Y. 382, it is held that the conductor of a freight train has no authority to consent to the carrying of a person upon a caboose attached to such train, but designed for the accommodation of employees, and in such case the presumption is that the person carried is not lawfully there. On the other hand, this presumption may be overthrown by the special circumstances, as in the case of Ohio & Miss. R. Co. *v.* Muhling, 30 Ill. 9, where the plaintiff was riding on a construction train, and in the cases of Ryan *v.* Cumberland Valley R. Co., 23 Pa. St. 384 [538] and Gillshannon *v.* Stony Brook Co., 10 Cush. 228 [536], where the plaintiff was riding on a gravel train.

So, in a case like the present, where the railroad carrier may derive some benefit from the presence of drovers upon its cattle trains, and may have allowed its employees in charge of such trains to invite or permit drovers to accompany their cattle, the presumption against a license to the person thus carried may be overthrown. It should have been left to the jury to determine, as a question of fact, whether, notwithstanding its rules for the government of its employees, the defendant had not held them out to the plaintiff as having authority to consent to his being carried. If it should appear that its employees have been accustomed to allow drovers to accompany their cattle on the cattle trains so generally and constantly that the officers of the company must have known it, the consent of the company may be predicated upon acquiescence and ratification.

A new trial is granted.

DUFF *v.* ALLEGHANY VALLEY R. CO.

91 Penn. St. 458. 1879.

Per Curiam. This was an action by a parent to recover damages for the death of her son on account of the alleged negligence of the defendants. It is clear, from the evidence, that the boy was on the train from day to day, not as a passenger or employee of the company, but by the connivance of the conductor, in order to sell newspapers. It is not like a person allowed by the conductor to ride in a car as a passenger without paying fare. In that case there is a legal liability to the company for the fare. This is the case of a mere trespasser, and the company owed him no duty. We are of opinion that the rulings of the learned judge below were right.

Judgment affirmed.

ST. JOSEPH, ETC., R. CO. *v.* WHEELER.

35 Kan. 185. 1886.

ACTION by De Witt C. Wheeler, as administrator of the estate of Frank Wheeler, deceased, against The Railroad Company, to recover damages for the benefit of the next of kin of the decedent, whose death is alleged to have been caused by the negligence of the defendant. Trial at the December Term, 1884, and judgment for plaintiff for $1500. The company brings the case here. The material facts are stated in the opinion.

JOHNSTON, J. De Witt C. Wheeler, as administrator of the estate of Frank Wheeler, deceased, brought this action under § 422 of the Civil Code, to recover damages for the benefit of the next of kin of Frank Wheeler, whose death, it is alleged, was caused by the gross carelessness and negligence of the St. Joseph & Western Railroad Company. There was but little dispute concerning the facts of the case. On June 17, 1881, the defendant below was operating a railroad which runs from Elwood westward through Doniphan and other counties of Kansas to Grand Island, Nebraska. On that day a work or construction train with a caboose car attached, was sent from Elwood to a point near Troy, for the purpose of being loaded with dirt to be brought back for the repair of the road-bed between Wathena and Elwood, with instructions to work until ten o'clock in the morning without regard to train No. 7, a freight train going west. While the train was being loaded, Frank Wheeler, in company with another boy, came up to the construction train, and learning that it was soon going eastward, asked the conductor if he might ride back. The conductor consented, and Frank Wheeler rode in the caboose car with other persons that belonged to the train. He paid no fare, and was not asked or expected to pay any. Soon after he was taken on, the construction train backed eastwardly toward Wathena, and before reaching that place, and at 9.45 A.M. of that day, it collided with the engine of train No. 7 going westward, in which collision Frank Wheeler was killed. The conductor of the construction train had instructions from the railroad company not to allow persons as passengers to ride upon his train except those who belonged to it, but this instruction was not communicated to Frank Wheeler. Upon these and some other facts which were shown upon the trial, a verdict for $1500 was given in favor of the plaintiff.

One of the questions raised is, that there was no correspondence between the pleadings and the evidence. The point is made that the plaintiff alleged that Frank Wheeler was a passenger,— a term which it is claimed implied that Frank Wheeler was travelling in a

public conveyance by virtue of a contract, express or implied, with the carrier, as the payment of fare, or that which is accepted as an equivalent therefor, while the evidence offered showed that he was carried on a train not designed for passengers, that no fare was collected or expected to be paid, and therefore that he did not stand toward the company in the relation of a passenger. This is one sense in which the term is used, but not the only one. It is commonly applied to any one who travels in a conveyance, or who is carried upon a journey, irrespective of the character of the conveyance or of compensation to the carrier. While the plaintiff alleged that Wheeler was carried as a passenger, he nowhere averred that he was carried for hire, nor can it be said that the petition was framed upon the theory that there was a contract relation between deceased and the company. It was rather upon the theory that he was not a trespasser upon the defendant's train, and it is specially alleged that he was upon the train with the knowledge and consent of the conductor. From this averment it is manifest that the pleader did not rely upon any agreement between the company and Wheeler, and did not intend to hold the company to extraordinary care, as it would be held in carrying persons who were passengers in a strictly legal sense; but rather, that as Wheeler was upon the train with the consent of the conductor, he was not wrongfully there, and the company owed him the duty of ordinary care. The action was founded upon the neglect of the company and not upon the breach of a contract; and allegations of the relation which he occupied toward the company are only material for the purpose of determining and fixing the grade of care owing to him by the company. As we interpret the petition, it did not allege that the relation of carrier and passenger existed by reason of an agreement between the deceased and the company, and therefore that there was no substantial variance between the pleadings and the evidence.

A series of instructions were prepared by the railroad company and disallowed by the court, and their refusal is assigned as error. Most of them in effect instructed a verdict in favor of the defendant, and asserted that the company cannot be held liable for injury to one who rides upon a construction train with the consent of the conductor, and who is not a passenger in the ordinary sense. They were properly refused. We concur with the view of the law taken by the trial judge where he states that: —

"Under the admitted facts and the evidence in the case the said Frank Wheeler was not a trespasser upon the defendant's train, although he was not in legal contemplation a passenger. A common carrier of passengers is bound to exercise extraordinary care towards its passengers, and is liable for slight negligence, but it does not owe the same degree of care to a person on one of its vehicles or trains, who does not stand in the relation of a passenger. To such persons a carrier owes only the duty of ordinary care, which

is that degree of care which persons of ordinary prudence would usually exercise under like circumstances."

It is contended that Frank Wheeler was an intruder upon the train, for whose injury no liability could arise against the company, for two reasons: First, that the conductor had instructions not to carry passengers on the construction train; and second, that from the nature of the business which was being done with the train, and also its equipment, it was apparent that the company did not permit passengers to be carried thereon. Neither of these circumstances will defeat a recovery in this case. It is true the conductor had been instructed not to allow persons to ride upon his train as passengers, but Frank Wheeler had no knowledge of such instruction. He had asked and obtained permission to ride upon the train. It was within the range of the employment of the conductor to grant such permission. He had entire charge of the train, and was the general agent of the company in the operation of the train. As he was the representative of the company, his act, and the permission given by him, may properly be regarded as the act of the company. If Wheeler had furtively entered upon the train, or had ridden after being informed that the rules of the company forbade it, or had obtained permission only from the engineer, brakeman, or some other subordinate employee, the argument made by counsel might apply.

In Dunn *v.* Grand Trunk Rly., 58 Me. 187, the plaintiff went on board a freight train with the knowledge of the conductor. One of the regulations of the company prohibited conductors from allowing passengers to travel upon its freight trains. He was not directed or requested to leave, but paid the usual fare to the conductor, and during the journey the car upon which he rode was thrown from the track and he was thereby injured. The court held that under the circumstances he had a right to suppose himself rightfully on board, and that if the act of the passenger did not conduce to the injury received, the company was responsible for the consequences of its negligence or want of care. C. & A. Rld. Co. *v.* Michie, Adm'x, 83 Ill. 427, was an action by the administratrix to recover damages for the death of her husband, which occurred while he was riding upon an engine. The rules of the company provided that no persons except the road master and conductor of the train were allowed to ride on the engine without the permission of the superintendent or master mechanic. He applied to the engine driver and was given permission to ride. It was ruled that the driver of the engine occupied only a subordinate position, and that his permission was not the permission of the company, as he had no power to give it; but it was added that —

"Had the conductor of the train given the permission, or knowing the deceased was upon the engine suffered him there to remain, it might be considered the act of the company, as the conductor has

control of the entire train, and his act is rightfully regarded as the act of the company."

In the case of Wilton *v.* Middlesex Rld. Co., 107 Mass. 108 [544], several young girls were invited by the driver to ride upon one of the defendant's cars. They got upon the front platform, and the driver immediately struck his horses, when, by reason of their suddenly starting, the plaintiff lost her balance and fell so that one of the wheels passed over her arm. It was admitted that the plaintiff was not a passenger for hire, and that the driver had no authority to take the girls upon the car unless such authority was implied from the fact of his employment as driver. In deciding the case the court said: —

"The driver of a horse-car is the agent of the corporation having charge in part of the car. If, in violation of his instructions, he permits persons to ride without pay, he is guilty of a breach of his duty as a servant. Such act is not one outside of his duty, but is one within the general scope of his agency, for which he is responsible to his master. In the case at bar, the invitation to the plaintiff to ride was an act within the general scope of the driver's employment, and if she accepted it innocently, she was not a trespasser. It is immaterial that the driver was acting contrary to his instructions."

In Lucas *v.* Milwaukee & St. P. Rly. Co., 33 Wis. 53, it was held that if a person rode upon a freight train without authority from some person competent to give it, he would have been unlawfully there, and could not have successfully enforced the rights of a passenger against the company, but the company had authorized the carriage of passengers upon some of its freight trains, and therefore a different ruling was applied. It was stated that —

"By making a portion of its freight trains lawful passenger trains, the defendant has, so far as the public is concerned, apparently given the conductors of all its freight trains authority to carry passengers, and if any such conductor has orders not to carry passengers upon his train, they are or may be in the nature of secret instructions limiting and restricting his apparent authority, and third persons are not bound by such instructions until informed thereof."

In support of the same view, we cite Jacobus *v.* St. Paul & Chicago Rly. Co., 20 Minn. 125 [657]; O. & M. Rld. Co. *v.* Muhling, 30 Ill. 9; Gindin *v.* St. Paul & Duluth Rly. Co., 30 Minn. 217; 11 Am. and Eng. Rld. Cases, 644; Lawson *v.* C. St. P. M. & O. Rld. Co., 21 Am. and Eng. Rld. Cases, 249.

Eaton *v.* D. & L. W. Rld. Co., 57 N. Y. 383, is relied upon as an authority for the position assumed by the company. The circumstances of that case are not like the one before us, and the decision is based on the special circumstances of the case. It differs materially in its facts from the one at bar. There, the party injured was invited by the conductor to ride upon a freight train with the promise

to get him employment as a brakeman; and, besides, it did not appear that passengers were either habitually or occasionally permitted to ride upon the freight trains of that company. Here, although disputed, it was satisfactorily shown that passengers were not only occasionally but commonly carried upon the freight and construction trains of the defendant. A. J. Shuster, who was employed upon the construction train at the time that Frank Wheeler was killed, testified that passengers were carried upon that train under certain circumstances. Albert Hinchman, who had been on the train three or four months, stated that the company had always carried passengers on all its freight trains while he was upon the road, and the passengers had frequently ridden on the construction train, and had frequently been taken on at points other than stations where the train was at work. Henry Wheeler states that prior to the accident he rode upon the construction train to Wathena, and paid fare to the conductor for such ride. A. J. Mowry, who travelled a great deal upon defendant's road, testified that it was usual to carry passengers on all caboose cars; that he rode on every kind of train that was ever on the road, and had ridden on defendant's construction trains before June 17, 1881, and paid fare to the conductor. It will thus be seen that it was customary for passengers to ride, with the permission of the conductor, upon all freight and construction trains upon the defendant's road; and the New York case, while similar in some of its features, is not an authority here. Persons not informed of the instructions given to the conductor, had a right, under this prevailing practice, to assume that the conductor had authority to carry passengers on the construction train, and that the granting of permission by him in such cases fell within his general authority as manager of the train. Nor was there anything in the exterior appearance of the car in which the deceased rode to notify him that passengers were not carried therein. The testimony is that it was a caboose car similar in construction and appearance to those which were attached to all of defendants' freight trains, and upon which, as has been seen, passengers were carried.

The railroad company asked an instruction that if the father of Frank Wheeler had, prior to the accident, relinquished unto him the right to his time and services during his minority, and that this relinquishment was unrevoked at his death, the plaintiff can recover only nominal damages. It was properly rejected. In such an action the plaintiff does not sue for his own benefit, but only as the personal representative of the deceased. The damages recovered inure to the exclusive benefit of the widow and children if there are any, and if not, to the next of kin. In this case the damages were for the benefit of the next of kin, who were the father and the mother.

The sum to be recovered was therefore not for the benefit of the father alone, who may have made the relinquishment, but for the

mother also. Besides, parents may recover for the death of a child who has attained his majority if they can prove any pecuniary damages resulting therefrom, such as the loss of support. In estimating the pecuniary benefit which would accrue to his parents by the continuance of his life, the fact that the parents relinquished to Frank Wheeler his time and services during his minority was an element which might properly be taken into consideration, and this much was stated to the jury.

None of the other objections raised are at all tenable, and as the charge given fairly presented the law of the case to the jury, the errors assigned will be overruled, and the judgment will be affirmed.

TOLEDO, ETC., R. CO. *v.* BROOKS.

81 Ill. 245. 1876.

THIS was an action on the case, by Julia A. Brooks, administratrix of the estate of William H. Brooks, deceased, against the Toledo, Wabash and Western Railway Company, to recover damages for causing the death of plaintiff's husband and intestate, through negligence. A trial was had, resulting in a verdict and judgment in favor of plaintiff, for $3166.

MR. JUSTICE WALKER. . . . . .

It is urged that the court erred in refusing to give the ninth or some one of the other instructions asked by plaintiff in error, but refused by the court. That instruction asserts that if deceased knew that the regulations of the company prohibited persons from travelling on the road without a ticket or the paying of fare, and if, after being so informed, he went on the train, and by arrangement with the conductor, was travelling without a ticket or paying his fare, deceased, in such case, would not be a passenger, and the company would not be liable for the negligence of their officers. In some form, all these refused instructions present this question.

Defendant in error insists that this case is governed by that of The Ohio and Mississippi Railroad Co. *v.* Muhling, 30 Ill. 9. In that case the passenger had been in the employment of the road, and was neither prohibited from getting on the train, nor informed that it was against the rules for him to do so without a ticket or the payment of fare. Again, the company, in that case, seems to have owed the plaintiff for labor, which would have enabled them to deduct the amount of fare from the amount owing him. It was there said, that if a person was lawfully on the train, and injuries ensued from the negligence of the employees of the company, the passenger thus injured might recover.

On the part of plaintiff in error it is urged that railroad companies, being liable for the want of care of their officers by which passengers suffer injury, must have the power to make all reasonable regulations for the government of their employees, and the power to enforce them; that is a reasonable regulation which prohibits persons from travelling upon their roads without purchasing a ticket or paying fare; that a person going on their road in known violation of such a rule, and by inducing the conductor to violate it, is not lawfully on the road, and the company should not be held responsible for an injury received by such person; that where a person actively participates in the violation of such a rule intentionally and knowingly, he does not occupy the same relation to the road as had he not known of the rule or not done any act to induce its violation.

It is manifest that if a person were stealthily, and wholly without the knowledge of any of the employees of the company, to get upon a train and secrete himself, for the purpose of passing from one place to another, he could not recover if injured. In such a case his wrongful act would bar him from all right to compensation. Then, does the act of the person who knowingly induces the conductor to violate a rule of the company, and prevails upon him to disregard his obligations to fidelity to his employer, to accomplish the same purpose, occupy a different position, or is he entitled to any more rights? He thereby combines with the conductor to wrong and defraud his employer out of the amount of his fare, and for his own profit. In this case the evidence tends strongly to show that both defendant in error and her husband had money more than sufficient to pay their fare to Danville, and a considerable distance beyond that place. If this be true, and defendant in error swears they had, then they were engaged in a deliberate fraud on the company, no less than by false representations to obtain their passage free from Decatur to Danville, and thus defraud the company out of the sum required to pay their fare. In this there is a broad distinction from Muhling's case, as in that case there was no pretence of fraud or wrong on his part. The court below should have given some one of the defendant's instructions which announced the view here expressed.

The evidence is not of the character to convince us that the judgment should stand, notwithstanding the erroneous instructions given or the refusal to give proper instructions. We have no doubt that the erroneous instructions given misled the jury in finding their verdict.

For the errors indicated, the judgment of the court below must be reversed and the cause remanded.

WAY v. CHICAGO, ETC., R. CO.

61 Iowa, 48. 1884.

THE plaintiff is the administrator of the estate of John Way, deceased. The action was brought by the decedent. After his death the present plaintiff was substituted. The plaintiff claims to recover for a personal injury alleged to have been received by the decedent as a passenger on one of defendant's trains, and by being thrown against a cupola platform, by defendant's negligence in making a coupling. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

ADAMS, J. In April, 1881, the decedent took passage upon a freight train at Monroe, Jasper County, for Oskaloosa. In payment of his fare, he presented a mileage ticket, which had been issued to one R. G. Forgrave, at commutation rates. The conductor of the train, without knowledge that Way was not Forgrave, detached the coupons for his passage. Printed upon the ticket were several conditions, and also a printed acceptance of the conditions, which was signed by Forgrave, and the whole was denominated a contract. One of the conditions is in these words: "This ticket is positively not transferable, and, if presented by any other than the person whose name appears on the inside of the cover, and whose signature is attached below, it is forfeited to the company."

The defendant's theory upon the trial below was, that the decedent was not a passenger within the meaning of the law, and asked the court to instruct accordingly. This the court refused to do, and gave an instruction in these words: "If you find from the evidence that the decedent was injured to the damage of his estate substantially as alleged, and that he was at that time riding in a caboose in the defendant's train, on the mileage ticket in evidence, issued by the defendant to R. G. Forgrave, and that, upon its presentation in payment for transportation, the conductor of the train accepted the ticket, and recognized and treated the decedent as a passenger, the defendant's duties and obligations were, and its liabilities now are, the same as if the ticket had been issued to the decedent, whether prior to the accident he disclosed to, or the conductor knew, his identity or not."

In respect to the measure of care which common carriers owe to passengers, the court gave an instruction as follows: "Common carriers of persons are required to do all that human care, vigilance, and foresight can reasonably do, in view of the character and mode of conveyance adopted, to prevent accident to passengers. Not the utmost degree of care which the human mind is capable of invent-

ing, but the highest degree of care and diligence which is reasonably practicable under the circumstances, is what is required."

The giving of these instructions is assigned as error. The defendant insists that the contract relied upon, as constituting the relation of common carrier and passenger, was obtained by imposition and virtual misrepresentation, and, it being now repudiated by the company by a denial by it of its liability, the plaintiff cannot be allowed to set it up as binding upon the company; and that, if the relation of common carrier and passenger did not exist, the company did not owe the decedent the measure of care set forth in the instruction.

It appears to us that the defendant's position in this respect is well taken. When the decedent presented the ticket, we must presume that he intended to be understood as claiming that he had a right to travel upon it. This claim involved the claim that he was Forgrave, for the ticket showed upon its face that no one had a right to travel upon it but Forgrave. By the presentation of the ticket, the decedent falsely personated Forgrave, with the intention of deceiving the company; and he did deceive it, and to its injury, for, by reason of the deception, he escaped the payment of the full rate with which he was otherwise chargeable.

It is not material, then, that the decedent obtained the conductor's consent. Whether his consent would have bound the company, if he had known that the decedent was not Forgrave, we need not inquire; it certainly did not under the circumstances shown. The only relation existing between the decedent and the company having been induced by fraud, he cannot be allowed to set up that relation against the company as a basis of recovery. He was, then, at the time of the injury, in the car, without the rights of a passenger, and without the right to be there at all. We do not say that it is necessary that a person should pay fare to be entitled to the rights of a passenger. It is sufficient, probably, if he has the consent of the company fairly obtained. But no one would claim that a mere trespasser has such rights; and it appears to us to be well settled that consent obtained by fraud is equally unavailing.

The plaintiff insists that the extraordinary care described in the instruction does not become due from common carriers by reason of any contract, but simply by a rule of law which enforces the duty upon broader grounds. It is not important to inquire precisely how the duty arises. However it arises, the duty is one which the common carrier owes only to passengers, and if, as we hold, the decedent did not sustain that relation within the meaning of the law, the company did not owe that duty to him, and that is the end of the inquiry. The doctrine which we announce was very clearly expressed in T., W. & W. R. Co. *v.* Beggs, 85 Ill. 80. In that case the court said: "Was defendant a passenger on that train in the true sense of that term? He was travelling on a free pass issued to one James Short, and not transferable, and passed himself as the

person named in the pass. By his fraud he was riding on the car. Under such circumstances, the company could only be held liable for gross negligence, which would amount to wilful injury." In Thompson on Carriers of Passengers, 43, section 3, the author goes even further. After stating the rule that the relation of carrier and passenger does not exist where one fraudulently obtains a free ride, he says: "This doctrine extends further, and includes the case of one who knowingly induces the conductor of a train to violate the regulations of the company, and disregard his obligations of fidelity to his employer." In U. P. R'y Co. *v.* Nichols, 8 Kan. 505, the defendant in error imposed himself upon the company as an express messenger, and obtained the consent of the conductor to carry him without fare. It was held that he did not become entitled to the rights of a passenger. The court, after quoting Sherman & Redfield's definition of a passenger, which is in these words: "A passenger is one who undertakes, with the consent of the carrier, to travel in the conveyance provided by the latter, other than in the service of the carrier as such," proceeds to say: "The consent obtained from the conductor was the consent that an express messenger might ride without paying his fare. Such consent did not apply to the plaintiff (the defendant in error)." See also the following cases: T., W. & W. R. Co. *v.* Brooks, 81 Ill. 292 [**554**]; M. & C. R. Co. *v.* Chastine, 54 Miss. 503; Creed *v.* Penn. R. Co., 86 Penn. St. 139; Relf *v.* Rupp, 3 W. & S. 21; Hayes *v.* Wells, Fargo & Co., 23 Cal. 185.

The plaintiff cites and relies upon Bissell *v.* R. Co.'s, 22 N. Y. 308; Washburn *v.* Nashville, &c., R. Co., 3 Head, 638; Jacobus *v.* St. Paul, &c., R. Co., 20 Minn. 125 [**657**]; Penn. R. Co. *v.* Brooks, 57 Pa. St. 346; Wilton *v.* Middlesex, R. Co., 107 Mass. 108 [**544**]; Flint, &c., R. Co. *v.* Weir, 37 Mich. 111 [**17**]; Dunn *v.* Grand Trunk R'y Co., 58 Me. 192; Edgerton *v.* N. Y., &c., R. Co., 39 N. Y. 227; Gregory *v.* Burlington, &c., R. Co. 10 Neb. 250; Great Northern R'y Co. *v.* Harrison, 10 Exch. 376. But none of these cases hold that the extraordinary care described in the instruction given is due to a person not a passenger, and none of them hold that the relation of passenger can be insisted upon, where the company shows affirmatively, as a defence, that the company's consent was obtained by fraud.

Certain special objections to the defence remain to be noticed. Sec. 2086 of the Code provides that "when by the terms of an instrument its assignment is prohibited, an assignment of it shall nevertheless be valid." The plaintiff cites this statute, and claims, as we understand, that the mere possession of the ticket by the decedent was *prima facie* evidence of an assignment to him, and that the assignment under the statute was valid, and, being such, it is immaterial whether the committee supposed that the decedent was Forgrave or not.

Without undertaking to set forth all the answers which we think might be made to this position, we think it sufficient to say that we do not think that the word "instrument," as used in the statute, was designed to embrace railroad tickets like the one in question. The purpose of such a ticket is to serve as evidence of a contract to render the party to whom it is issued a personal service, to wit, the transportation of himself and baggage, and no one else, over the route described. The language is: "On presentation of this ticket, with coupons and contract attached, Mr. R. G. Forgrave may travel," &c. While section 2085 treats of instruments whereby the maker acknowledges labor to be due another, and while a valid assignment may undoubtedly be made of such instruments under the statute, we cannot properly so construe the statute as to hold that the essential nature of the contract can be changed, so as to require the maker to do not only what he did not agree to do, but what the other party expressly stipulated that the maker should not be required to do. The case is not different from one where an individual or corporation should agree to transport certain specific freight, and no other. No assignment could be made of the contract which would impose upon the maker the obligation to transport different freight. It is said by the company that Forgrave was a commercial traveller, and that the company was interested in facilitating commercial travellers, and in developing commerce along its line; but it is not important to inquire how this is. It is certain that we cannot go beyond the company's contract, so far as its essential nature is concerned.

Another statute relied upon is section 11, chapter 77, Laws of 1878. The section is in these words: "No railroad corporation shall charge, demand, or receive from any person . . . for the transportation of persons . . . , or for any other service, a greater sum than it shall, at the same time, charge, demand, or receive from any other person . . . for a like service from the same place, or upon like conditions and under similar circumstances." The plaintiff's position, as we understand it, is that the act of the company in commuting rates to Forgrave, though he might have belonged to a certain class, and though the company might have been interested in facilitating such class, was nevertheless a violation of law, and, being such, the acts of the decedent in gaining the advantage of the rates commuted to Forgrave, though done by imposition, were justifiable, and did not preclude him from insisting that he had the same rights that he would have had if he had paid full rates, or otherwise had obtained the consent of the company without fraud.

It is a sufficient answer to say that if the company charged illegal rates it was not done in charging Forgrave less, but some one else more; nor could the decedent properly obtain the rates made to Forgrave by personating Forgrave. Whether, if he had appeared in his own name, and demanded that the rates made to Forgrave should be made to him, and the company had refused, he would

have had a right to complain, we need not determine, as we have no such case.

Another position taken by the plaintiff is that the ticket provides its own penalty for its violation, to wit, a forfeiture, and that no other penalty can be added.

But the question before us is not as to the enforcement of a penalty by the company, but as to whether the decedent acquired the rights of a passenger. The right of the company to insist that he did not, if he never properly acquired the consent of the company to carry him as such, is independent of any question of penalty. We think that the instruction given by the court is erroneous, and that the judgment must be *Reversed.*

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4. LIABILITY FOR INJURIES.

a. *From negligence.*

CHRISTIE *v.* GRIGGS.

Before Mansfield, C. J. 2 Camp. 79. 1809.

This was an action of *assumpsit* against the defendant as owner of the Blackwall stage, on which the plaintiff, a pilot, was travelling to London, when it broke down, and he was greatly bruised. The first count imputed the accident to the negligence of the driver; the second, to the insufficiency of the carriage.

The plaintiff having proved that the axle-tree snapped asunder at a place where there is a slight descent, from the kennel crossing the road; that he was, in consequence, precipitated from the top of the coach; and that the bruises he received confined him several weeks to his bed, — there rested his case.

Best, Sergeant, contended strenuously that the plaintiff was bound to proceed farther, and give evidence, either of the driver being unskilful, or of the coach being insufficient.

Sir James Mansfield, C. J. I think the plaintiff has made a *prima facie* case by proving his going on the coach, the accident, and the damage he has suffered. It now lies on the other side to show that the coach was as good a coach as could be made, and that the driver was as skilful a driver as could anywhere be found. What other evidence can the plaintiff give? The passengers were probably all sailors like himself, and how do they know whether the coach was well built, or whether the coachman drove skilfully? In many other cases of this sort it must be equally impossible for the plaintiff to give the evidence required. But when the breaking down or over-

turning of the coach is proved, negligence on the part of the owner is implied. He has always the means to rebut this presumption, if it be unfounded; and it is now incumbent on the defendant to make out, that the damage in this case arose from what the law considers *a mere accident*.

The defendant then called several witnesses, who swore that the axle-tree had been examined a few days before it broke without any flaw being discovered in it; and that when the accident happened, the coachman, a very skilful driver, was driving in the usual track and at a moderate pace.

Sir JAMES MANSFIELD said, as the driver had been cleared of everything like negligence, the question for the jury would be, — as to the sufficiency of the coach. If the axle-tree was sound as far as human eye could discover, the defendant was not liable. There was a difference between a contract to carry goods, and a contract to carry passengers. For the goods the carrier was answerable at all events. But he did not warrant the safety of the passengers. His undertaking as to them went no farther than this, that as far as human care and foresight could go, he would provide for their safe conveyance. Therefore if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered.

The jury found a verdict for the defendant.

INGALLS *v.* BILLS.

9 Met. (Mass.) 1. 1845.

ASSUMPSIT on an implied promise of the defendants as coach proprietors and common carriers of passengers, to convey the plaintiff safely from Boston to Cambridge.

At the trial in the Court of Common Pleas, before WILLIAMS, C. J., the plaintiff introduced evidence tending to prove that, on the 23d of September, 1841, he and several other persons took outside seats, as passengers, on the top of the defendants' coach, to be conveyed from Boston to Cambridge; that on the way, in Court Street, in Boston, while proceeding at a moderate rate, and without coming in contact with anything, or meeting any obstruction, the hind axle-tree of the coach broke, one of the hind wheels came off, and the coach settled down on one side, without being overset; that the plaintiff and some other outside passengers, being alarmed, jumped from the top of the coach upon the pavement; and that the plaintiff's left arm was thereby badly injured.

The defendants introduced evidence tending to prove that they had taken all possible care, and incurred extraordinary expense in

order that the said coach should be of the best materials and workmanship, that at the time of the accident the coach, so far as could be discovered from the most careful inspection and examination externally, was strong, sound, and sufficient for the journey; and that they had uniformly exercised the utmost vigilance and care to preserve and keep the same in a safe and roadworthy condition. But the evidence further tended to prove that there was an internal defect or flaw in the iron of the axle-tree, at the place where it was broken as aforesaid, about three-eighths of an inch in length, and wide enough to insert the point of a fine needle or pin — which defect or flaw appeared to have arisen from the forging of the iron, and which might have been the cause of the said breaking; that the said defect was entirely surrounded by sound iron one-quarter of an inch thick; and that the flaw or defect could not possibly have been discovered by inspection and examination externally.

Upon this evidence the defendants moved the court to instruct the jury that it was the duty of the defendants to use all possible care in providing a good coach, in keeping the same in due repair, and in due examination into its condition; and if they took such care, and the accident happened, without any fault or negligence on their part, but by reason of a defect which they could not discover, then the verdict should be for them; and that the plaintiff was not entitled to a verdict, unless the jury were of opinion that there was some degree of actual fault or negligence on the part of the defendants.

The judge declined giving these instructions, but submitted the evidence to the jury, with instructions that the defendants were bound by law, and by an implied promise on their part, to provide a coach not only apparently, but really roadworthy; that they were liable for any injury that might arise to a passenger from a defect in the original construction of the coach, although the imperfection was not visible and could not be discovered upon inspection and examination; and that if the jury were satisfied, from the evidence, that the axle-tree broke in consequence of the original flaw or defect in the interior thereof, and the plaintiff was injured thereby, he was entitled to a verdict, although that flaw was invisible, and could not be discovered by inspection and examination externally.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

Hubbard, J. The question presented in this case is one of much importance to a community like ours, so many of whose citizens are engaged in business which requires their transportation from place to place in vehicles furnished by others; and though speed seems to be the most desirable element in modern travel, yet the law points more specifically to the security of the traveller.

Under the charge of the learned judge who tried this case, we are called upon to decide whether the proprietors of stage-coaches are

answerable for all injuries to passengers arising from accidents happening to their coaches, although proceeding from causes which the greatest care in the examination and inspection of the coach could not guard against or prevent; or, in other words, whether a coach must be alike free from secret defects, which the owner cannot detect, after the most critical examination, as from those which might, on such an examination, be discovered.

The learned judge ruled that the defendants, as proprietors of a coach, were bound by law, and by an implied promise on their part, to provide a coach, not only apparently, but really, roadworthy, and that they were liable for any injury that might arise to a passenger from a defect in the original construction of the coach, although the imperfection was not visible, and could not be discovered upon inspection and examination.

The law respecting common carriers has ever been rigidly enforced, and probably there has been as little relaxation of the doctrine, as maintained by the ancient authorities, respecting this species of contract, as in any one branch of the common law. This arises from the great confidence necessarily reposed in persons engaged in this employment. Goods are intrusted to their sole charge and oversight, and for which they receive a suitable compensation; and they have been, and still are, held responsible for the safe delivery of the goods, with but two exceptions, viz., the act of God and the king's enemies; so that the owners of goods may be protected against collusive robberies, against thefts and embezzlements, and negligent transportation. But in regard to the carriage of passengers, the same principles of law have not been applied; and for the obvious reason that a great distinction exists between persons and goods, the passengers being capable of taking care of themselves, and of exercising that vigilance and foresight in the maintenance of their rights, which the owners of goods cannot do, who have intrusted them to others.

It is contended by the counsel for the plaintiff, that the proprietor of a stage-coach is held responsible for the safe carriage of passengers so far that he is a warrantor that his coach is roadworthy, that is, is absolutely sufficient for the performance of the journey undertaken; and that if an accident happens, the proof of the greatest care, caution, and diligence, in the selecting of the coach, and in the preservation of it during its use, will not be a defence to the owner; and it is insisted that this position is supported by various authorities. The cases, among many others, cited, which are more especially relied upon, are those of Israel *v.* Clark, 4 Esp. R. 259; Crofts *v.* Waterhouse, 3 Bing. 319; Bremner *v.* Williams, 1 Car. & P. 414; and Sharp *v.* Grey, 9 Bing. 457. If these cases do uphold the doctrine for which they are cited, they are certainly so much in conflict with other decided cases, that they cannot be viewed in the light of established authorities. But we think, upon

an examination of them and comparing them with other cases, they will not be found so clearly to sustain the position of the plaintiff as has been argued.

It must be borne in mind that the carrying of passengers for hire, in coaches, is comparatively a modern practice; and that though suits occur against owners of coaches, for the loss of goods, as early as the time of Lord Holt, yet the first case of a suit to recover damages by a passenger, which I have noticed, is that of White *v.* Boulton, Peake's Cas. 81, which was tried before Lord Kenyon in 1791, and published in 1795. That was an action against the proprietors of the Chester mail-coach for the negligence of the driver, by reason of which the coach was overturned, and the plaintiff's arm broken, and in which he recovered damages for the injury; and Lord Kenyon, in delivering his opinion, said, "when these (mail) coaches carried *passengers*, the proprietors of them were bound to carry them safely and properly." The correctness of the opinion cannot be doubted, in its application to a case of negligence. The meaning of the word "safely," as used in declarations for this species of injury, is given hereafter.

The next case which occurred was that of Aston *v.* Heaven, 2 Esp. R. 533, in 1797, which was against the defendants, as proprietors of the Salisbury stage-coach, for negligence in the driving of their coach, in consequence of which it was overset and the plaintiff injured. This action was tried before Eyre, C. J. It was contended by the counsel for the plaintiff, that coach owners were liable in all cases, except where the injury happens from the act of God or the king's enemies; but the learned judge held that cases of loss of goods by carriers were totally unlike the case before him. In those cases, the parties are protected by the custom; but as against carriers of persons, the action stands alone on the ground of negligence.

The next case was that of Israel *v.* Clark, 4 Esp. R. 259, in 1803, where the plaintiff sought to recover damages for an injury arising from the overturning of the defendant's coach, in consequence of the axle-tree having broken; and one count alleged the injury to have arisen from the overloading of the coach. It was contended that if the owners carried more passengers than they were allowed by Act of Parliament, that should be deemed such an overloading. To this Lord Ellenborough, who tried the cause, assented, and said, "if they carried more than the statute allowed they were liable to its penalties; but they might not be entitled to carry so many; it depended on the strength of the carriage. They were bound by law to provide sufficient carriages for the safe conveyance of the public who had occasion to travel by them. At all events, he would expect a clear landworthiness in the carriage itself to be established." This is one of the cases upon which the present plaintiff specially relies. It was a *nisi prius* case, and it does not appear upon which count the jury found their verdict. But the point pending in the

present case was neither discussed nor started, viz., whether the accident arose from the negligence of the owner in not providing a coach of sufficient strength, or from a secret defect not discoverable upon the most careful examination. No opinion was expressed whether the action rests upon negligence or upon an implied warranty. But it was stated that the defendants were bound by law to provide sufficient carriages for the passage, and, at all events, that there should be a clear landworthiness in the carriage itself.

The general position is not denied with regard to the duty of an owner to provide safe carriages. The duty, however, does not in itself import a warranty. The judge himself may have used stronger expressions in the terms, "landworthiness in the carriage," than he intended by the thought of seaworthiness in a ship, and the duty of shipowners in that respect. If the subject had been discussed, and the distinctions now presented had been raised, and then the opinion had followed, as expressed in the report, it would be entitled to much more consideration than the mere strength of the words now impart to it.

The next case was that of Christie *v.* Griggs, 2 Campb. 79 [**560**], in 1809. There the axle-tree of the coach snapped asunder at a place where there was a slight descent from the kennel crossing the road, and the plaintiff was thrown from the top of the coach. Sir James Mansfield, in instructing the jury, said: "As the driver had been cleared of negligence, the question for the jury was as to the sufficiency of the coach. If the axle-tree was sound, as far as human eye could discover, the defendant was not liable. There was a difference between a contract to carry goods and a contract to carry passengers. For the goods, the carrier was answerable at all events, but he did not warrant the safety of the passengers. His undertaking as to them went no further than this, that, as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered."

The case of Bremner *v.* Williams, 1 Car. & P. 414, in 1824, is relied on by the plaintiff. There, Best, C. J., said he considered that "every coach proprietor warrants to the public that his stage-coach is equal to the journey it undertakes, and that it is his duty to examine it previous to the commencement of every journey." And so, in Crofts *v.* Waterhouse, 3 Bing. 321, in 1825, Best, C. J., said: "The coachman must have competent skill, and use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength, and properly made; and also with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens." But though this language is strong, and would apparently import a warranty,

on the part of the stage proprietor, as to the sufficiency of his coach, yet Park, J., in the same case said, "a carrier of passengers is only liable for negligence." This shows that the court did not mean to lay down the law, that a stage proprietor is in fact a warrantor of the sufficiency of his coach and its equipments, but that he is bound to use the utmost diligence and care in making suitable provision for those whom he carries; and we think such a construction is warranted by the language of the same learned judge (Best), in the case of Harris *v.* Costar, 1 Car. & P. 636, in 1825, where the averment in the declaration was, that the defendant undertook to carry the plaintiff safely. The judge held that it did not mean that the coach proprietor undertook to convey safely absolutely, but that it was to be construed like all other instruments, taking the whole together, and meant that the defendants were to use due care.

But the case mainly relied upon by the plaintiff is that of Sharp *v.* Grey, 9 Bing. 457, where the axle-tree of a coach was broken and the plaintiff injured. There the axle was an iron bar enclosed in a frame of wood of four pieces, secured by clamps of iron. The coach was examined, and no defect was obvious to the sight. But after the accident a defect was found in a portion of the iron bar, which could not be discovered without taking off the woodwork; and it was proved that it was not usual to examine the iron under the woodwork, as it would rather tend to insecurity than safety. It does not appear by the statement, that the defect could not have been seen, on taking off the woodwork; but it would rather seem that it might have been discovered. However that may be, the language of different judges, in giving their opinion is relied upon as maintaining the doctrines contended for by the plaintiff. Gaselee, J., held that "the burden lay on the defendant to show there had been no defect in the construction of the coach." Bosanquet, J., said: "The chief justice" (who tried the case) "held that the defendant was bound to provide a safe vehicle, and the accident happened from a defect in the axle-tree. If so, when the coach started it was not roadworthy, and the defendant is liable for the consequence, upon the same principle as a ship-owner who furnishes a vessel which is not seaworthy." And Alderson, J., said he was of the same opinion, and that "a coach proprietor is liable for all defects in his vehicle, which can be seen at the time of construction, as well as for such as may exist afterwards, and be discovered on investigation. The injury in the present case appears to have been occasioned by an original defect of construction: and if the defendant were not responsible, a coach proprietor might buy ill-constructed or unsafe vehicles, and his passengers be without remedy."

This case goes far to support the plaintiff in the doctrine contended for by his counsel, as it would seem to place the case upon the ground that the coach proprietor must, at all events, provide a coach absolutely and at all times sufficient for the journey, and that he

is a warrantor to the passenger to provide such a coach. But we incline to believe the learned judges gave too much weight to the comparison of Bosanquet, J., viz., that a coach must be roadworthy on the same principle that a ship must be seaworthy. We think the comparison is not correct, and that the analogy applies only where goods are carried, and not where passengers are transported. And no case has been cited, where a passenger has sued a ship-owner for an injury arising to him personally in not conducting him in a seaworthy ship. If more was intended by the learned court, than that a coach proprietor is bound to use the greatest care and diligence in providing suitable and sufficient coaches, and keeping them in a safe and suitable condition for use, we cannot agree with them in opinion. To give their language the meaning contended for in the argument of the case at bar is, in fact, to place coach proprietors in the same predicament with common carriers, and to make them responsible, in all events, for the safe conduct of passengers, so far as the vehicle is concerned. But that the case of Sharp *v.* Grey is susceptible of being placed on the ground which we think tenable, namely, that negligence and not warranty lies at the foundation of actions of this description, may be inferred from the language of Mr. Justice Park, who, in giving his opinion, says: "This was entirely a question of fact. It is clear that there was a defect in the axle-tree; and it was for the jury to say whether the accident was occasioned by what, in law, is called negligence in the defendant, or not." And Tindal, C. J., who tried the cause before the jury, left it for them to consider whether there had been that vigilance which was required by the defendant's engagement to carry the plaintiff safely; thus apparently putting the case on the ground of negligence and not of warranty. See also Bretherton *v.* Wood, 3 Brod. & Bing. 54, and 6 Moore, 141; Ansell *v.* Waterhouse, 6 M. & S. 385, and 2 Chit. R. 1.

The same question has arisen in this country, and the decisions exhibit a uniformity of opinion that coach proprietors are not liable as common carriers, but are made responsible by reason of negligence. In the case of Camden and Amboy Railroad Co. *v.* Burke, 13 Wend. 626, the court say that the proprietors of public conveyances are liable at all events for the baggage of passengers; but as to injuries to their persons, they are only liable for the want of such care and diligence as is characteristic of cautious persons. And in considering the subject again in the case of Hollister *v.* Nowlen, 19 Wend. 236 [**173**], they say that "stage-coach proprietors, and other carriers by land and water, incur a very different responsibility in relation to the passenger and his baggage. For an injury to the passenger they are answerable only where there has been a want of proper care, diligence, or skill; but in relation to baggage, they are regarded as insurers, and must answer for any loss not occasioned by inevitable accident or the public enemies."

In a case which occurred in respect to the transportation of slaves, Boyce v. Anderson, 2 Pet. 155 [488], Chief Justice Marshall, in giving the opinion of the court, says: "The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in cases to which it has been applied, we admit its necessity and policy, we do not think it ought to be carried further or applied to new cases. We think it has not been applied to living men, and that it ought not to be applied to them." So in the case of Stokes v. Saltonstall, 13 Pet. 181, the question arose and was thoroughly discussed; and the same opinions are maintained as in the cases above cited from Wendell. And the whole subject is examined by Judge Story, in his Treatise on Bailments, §§ 592-600, with his usual learning; and his result is the same.

If there is a discrepancy between the English authorities which have been cited, we think the opinions expressed by Chief Justice Eyre and Chief Justice Mansfield are most consonant with sound reason, as applicable to a branch of the law comparatively new, and though given at *nisi prius*, are fully sustained by the discussions which the same subject has undergone in the courts of our own country. We have said, as being most consonant with sound reason or good common sense, as applied to so practical a subject; because, if such a warranty were imposed by force of law upon the proprietors of coaches and other vehicles for the conveyance of passengers, they would in fact become the warrantors of the work of others, over whom they have no actual control, and — from the number of artisans employed in the construction of the materials of a single coach — whom they could not follow. Unless, therefore, by the application of a similar rule, every workman shall be held as the warrantor, in all events, of the strength, sufficiency, and adaptation of his own manufactures to the uses designed — which, in a community like ours, could not be practically enforced — the warranty would really rest on the persons purchasing the article for use, and not upon the makers.

If it should be said that the same observations might be applied to ship-owners, the answer might be given, that they have never been held as the warrantors of the safety of the passengers whom they conveyed; and as to the transportation of goods, owners of general ships have always been held as common carriers, for the same reasons that carriers on land are bound for the safe delivery of goods intrusted to them. But as it respects the seaworthiness of a ship, the technical rules of law respecting it have been so repeatedly examined, and the facts upon which they rest so often investigated, that the questions which arise are those of fact and not of law, and in a vast proportion of instances depend upon the [illegible] of diligence and care which are used in the preservation of vessels, and practically resolve themselves into questions of negli-

gence; so that the evils are very few that arise from the maintenance of the doctrine that a ship must be seaworthy in order to be the subject of insurance.

The result to which we have arrived, from the examination of the case before us, is this: That carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen in order to prevent those injuries which human care and foresight can guard against; and that if an accident happens from a defect in the coach, which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger, happening by reason of such accident. On the other hand, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense. And we are of opinion that the instructions, which the defendants' counsel requested might be given to the jury in the present case, were correct in point of law, and that the learned judge erred in extending the liability of the defendants further than was proposed in the instructions requested.

The point arising on the residue of the instructions was not pressed in the argument; and we see no reason to doubt its correctness, provided the peril to which the plaintiff was exposed arose from a defect or accident for which the defendants were otherwise liable: Jones *v.* Boyce, 1 Stark. R. 493.

New trial granted.

MEIER *v.* PENNSYLVANIA R. CO.

64 Penn. St. 225. 1870.

This was an action on the case for negligence, brought February 5th, 1868, by Theodore G. Meier against the Pennsylvania Railroad Company.

The plaintiff's case was the following: —

On the evening of February 7th, 1867, Theodore G. Meier, the plaintiff in error, took passage on the train of defendant's cars at Jersey City, bound for St. Louis. He occupied the sleeping car, which was the rear car of the train. On the following morning, about eight o'clock, at a point on defendant's road between Tyrone

and Altoona — the train running at a speed of twenty-six miles to the hour on an ascending grade — the axle of the forward truck broke in two places. The end of the car then dropped down and slid along the rails. The plaintiff was thrown forward so that his knee caught in the side-rest of the seat, and the ligaments of the right knee-joint were torn, and the bones of his leg were severely bruised.

The defendants proved that new wheels and new axles had been put under the car in October, 1866; the axles were made at the Sligo Works of Lyon, Shorb & Co., and they were of good quality, that the train had been inspected seventy miles east of the place of the accident, and again twenty-two miles east of it; the truck and the road were in good order; the train running at a proper speed. They gave a large amount of evidence to show that minute and constant care had been exercised to keep the road, apparatus, cars, running gear, &c., in perfect order, and that they employed such appliances, &c., as are approved by the most experienced railroad operators and mechanics; and gave evidence generally for the purpose of showing that they used the utmost care that human knowledge, skill, and foresight could provide, and that the accident was due to some circumstance against which these could not guard.

Verdict for the defendants.

Agnew, J. It is agreed on all hands, says Judge Redfield, in his work on Railways, ed. 1867, p. 174, that carriers of passengers are liable only for negligence either proximate or remote, and that they are not insurers of the safety of their passengers, as they are as carriers of goods and baggage of passengers. The numerous cases cited from which this result is drawn, justify this statement: Alden *v.* N. Y. Central Railroad Co., 26 N. Y. 102, holding that a carrier is bound absolutely to provide a safe vehicle, irrespective of any question of negligence, is not in accord with the American cases generally, or the modern English decisions. It is reviewed in Readhead *v.* Midland Railroad Co., 2 Law Rep. C. B. 412, and therein said not to be founded in good reason. See the cases collected in Shearman & Redfield on Negligence (1869), 299, § 267.

The language of Judge Gibson, taken from N. Jersey Railroad Co. *v.* Kennard, 9 Harris, 204, that a carrier of either goods or passengers is bound to provide a carriage or vehicle perfect in all its parts, in default of which he becomes responsible for any loss or injury that may be suffered, has no relation to the question now before us. The case he was considering was that of a car made without guards at the windows to prevent the arms of passengers being thrust out, to their injury, which he considered a defect in the construction of the car, making the carrier liable for negligence. The car was not perfect in its parts, as he thought. The car was imperfect in construction, and therefore not adapted to the end to be attained, to wit, security. It may not be amiss to say that this opinion of the Chief Justice as to window guards was not sustained

by the court *in banc*, and has since been overruled in Pittsburg & Connellsville Railroad Co. *v.* McCleary, 6 P. F. Smith, 294. The doctrine we are now asked to sustain is that, though the car is perfect in all its parts, if imperfect from some latent and undiscoverable defect, which the utmost skill and care could neither perceive nor provide against, the railway company must still be held responsible for injury to passengers, on the ground of an absolute liability for every defect. The plaintiff in error in effect contends that the defendants were warrantors against every accident, but even in the case referred to, Judge Gibson denied this rule. He said of the carrier, he is bound to guard him (the passenger) from every danger which extreme vigilance can prevent. This expresses the true measure of responsibility. He answered a point in these words: "That the company is responsible only for defects discoverable by a careful man after a careful examination and exercise of sound judgment." Thus: "This is true, but were there such an examination and exercise of judgment? The defective construction of the car must have been obvious to the dullest perception," &c. The same rule was laid down in Laing *v.* Colder, 8 Barr. 482. Judge Bell says, it is long since settled that the common-law responsibilities of carriers of goods for hire do not as a whole extend to carriers of passengers. The latter are not insurers against all accidents. But though (he says) in legal contemplation they *do not warrant the absolute safety of* their passengers, they are bound to the exercise of the utmost degree of diligence and care. The slightest neglect against which human prudence and foresight may guard, and by which hurt or loss is occasioned, will render them liable in damages. The same doctrine will be found in substance in Railroad Co. *v.* Aspell, 11 Harris, 149, and Sullivan *v.* The Philadelphia & Reading Railroad Co., 6 Casey, 234, and in other cases. In all the Pennsylvania cases, it will be found that negligence is the ground of liability on the part of a carrier of passengers. Absolute liability requires absolute perfection in machinery in all respects, which is impossible.

The utmost which human knowledge, human skill, and human foresight and care can provide is all that in reason can be required. To ask more is to prohibit the running of railways, unless they possess a capital and surplus which will enable them to add a new element to their business, that of insurance. Nor can we carry the requirement beyond the use of known machinery and modes of using it. Railroads must keep pace with science and art and modern improvement in their application to the carriage of passengers, but are not responsible for the unknown as well as the new. The rule laid down by the learned judge, in the language quoted in the second assignment of error, is a correct summary of the law. The rule of responsibility differs from the rule of evidence. *Prima facie*, where a passenger, being carried on a train, is injured without fault of his

own, there is a legal presumption of negligence, casting upon the carrier the onus of disproving it; Laing *v.* Colder, 8 Barr. 482; Sullivan *v.* Philadelphia & Reading Railroad Co., 6 Casey, 234; Shearman & Redfield on Negl. § 280; Redfield on Railways, § 1760, and notes. This is the rule when the injury is caused by a defect in the road, cars, or machinery, or by a want of diligence or care in those employed, or by any other thing which the company can and ought to control as a part of its duty to carry the passengers safely; but this rule of evidence is not conclusive. The carrier may rebut the presumption and relieve himself from responsibility by showing that the injury arose from an accident which the utmost skill, foresight, and diligence could not prevent.

We think none of the errors assigned are sustained, and the judgment is therefore affirmed.

STEAMBOAT NEW WORLD *v.* KING.

16 How. (U. S.) 469. 1853.

This was an appeal from the District Court of the United States for the Northern District of California.

It was libel filed by King, complaining of severe personal injury, disabling him for life, from the explosion of the boiler of the steamboat "New World," while he was a passenger, on her passage from Sacramento to San Francisco, in California.

The District Court decreed for the libellant in twenty-five hundred dollars damages and costs; and the owners of the boat appealed to this court.

The substance of the evidence is stated in the opinion of the court.

Mr. Justice Curtis. This is an appeal from a decree of the District Court of the United States for the Northern District of California, sitting in admiralty. The libel alleges that the appellee was a passenger on board the steamer on a voyage from Sacramento to San Francisco, in June, 1851, and that, while navigating within the ebb and flow of the tide, a boiler flue was exploded through negligence, and the appellee grievously scalded by the steam and hot water.

The answer admits that an explosion occurred at the time and place alleged in the libel, and that the appellee was on board and was injured thereby, but denies that he was a passenger for hire, or that the explosion was the consequence of negligence.

The evidence shows that it is customary for the masters of steamboats to permit persons whose usual employment is on board of such

boats to go from place to place free of charge; that the appellee had formerly been employed as a waiter on board this boat; and just before she sailed from Sacramento he applied to the master for a free passage to San Francisco, which was granted to him, and he came on board.

It has been urged that the master had no power to impose any obligation on the steamboat by receiving a passenger without compensation.

But it cannot be necessary that the compensation should be in money, or that it should accrue directly to the owners of the boat. If the master acted under an authority usually exercised by masters of steamboats, if such exercise of authority must be presumed to be known to and acquiesced in by the owners, and the practice is, even indirectly, beneficial to them, it must be considered to have been a lawful exercise of an authority incident to his command.

It is proved that the custom thus to receive steamboat men is general. The owners must therefore be taken to have known it, and to have acquiesced in it, inasmuch as they did not forbid the master to conform to it. And the fair presumption is, that the custom is one beneficial to themselves. Any privilege generally accorded to persons in a particular employment tends to render that employment more desirable, and of course to enable the employer more easily and cheaply to obtain men to supply his wants.

It is true the master of a steamboat, like other agents, has not an unlimited authority. He is the agent of the owner to do only what is usually done in the particular employment in which he is engaged. Such is the general result of the authorities. Smith on Mer. Law, 559; Grant *v.* Norway, 10 Com. B. 688, S. C. 2 Eng. L. and Eq. 337; Pope *v.* Nickerson, 3 Story, R. 475; Citizens Bank *v.* Nantucket Steamboat Co., 2 Story, R. 32. But different employments may and do have different usages, and consequently confer on the master different powers. And when, as in this case, a usage appears to be general, not unreasonable in itself, and indirectly beneficial to the owner, we are of opinion the master has power to act under it and bind the owner.

The appellee must be deemed to have been lawfully on board under this general custom.

Whether precisely the same obligations in all respects on the part of the master and owners and their boat existed in his case, as in that of an ordinary passenger paying fare, we do not find it necessary to determine. In the Philadelphia and Reading Railroad Company *v.* Derby, 14 How. R. 486, which was a case of gratuitous carriage of a passenger on a railroad, this court said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise,

the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of gross."

We desire to be understood to reaffirm that doctrine, as resting, not only on public policy, but on sound principles of law.

The theory that there are three degrees of negligence, described by the terms slight, ordinary, and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation. In Storer *v.* Gowen, 18 Maine R. 177, the Supreme Court of Maine say: "How much care will, in a given case, relieve a party from the imputation of gross negligence, or what omission will amount to the charge, is necessarily a question of fact, depending on a great variety of circumstances which the law cannot exactly define." Mr. Justice Story, Bailments, § 11, says: "Indeed, what is common or ordinary diligence is more a matter of fact than of law." If the law furnishes no definition of the terms gross negligence or ordinary negligence, which can be applied in practice, but leaves it to the jury to determine, in each case, what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned.

Recently the judges of several courts have expressed their disapprobation of these attempts to fix the degrees of diligence by legal definitions and have complained of the impracticability of applying them. Wilson *v.* Brett, 11 Meeson & Wels. 113; Wyld *v.* Pickford, 8 *id.* 443, 461, 462; Hinton *v.* Dibbin, 2 Q. B. 646, 651. It must be confessed that the difficulty in defining gross negligence, which is apparent in perusing such cases as Tracy *et al. v.* Wood, 3 Mason, 132, and Foster *v.* The Essex Bank, 17 Mass. 479, R., would alone be sufficient to justify these complaints. It may be added that some of the ablest commentators on the Roman law and on the Civil Code of France have wholly repudiated this theory of three degrees of diligence as unfounded in principles of natural justice, useless in practice, and presenting inextricable embarrassments and difficulties. See Toullier's Droit Civil, 6th vol., p. 239, &c.; 11th vol., p. 203, &c.; Makeldey, Man. Du Droit Romain, 191, &c.

But whether this term gross negligence be used or not, this particular case is one of gross negligence according to the tests which have been applied to such a case.

In the first place, it is settled that "the bailee must proportion

his care to the injury or loss which is likely to be sustained by any improvidence on his part." Story on Bailments, § 15.

It is also settled that, if the occupation or employment be one requiring skill, the failure to exert that needful skill, either because it is not possessed or from inattention, is gross negligence. Thus Heath, J., in Shields *v.* Blackburn, 1 H. Bl. 161, says: "If a man applies to a surgeon to attend him in a disorder, for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action. The surgeon would also be liable for such negligence if he undertook, gratis, to attend a sick person, because his situation implies skill in surgery." And Lord Loughborough declares that an omission to use skill is gross negligence. Mr. Justice Story, although he controverts the doctrine of Pothier that any negligence renders a gratuitous bailee responsible for the loss occasioned by his fault, and also the distinction made by Sir William Jones between an undertaking to carry and an undertaking to do work, yet admits that the responsibility exists where there is a want of due skill or an omission to exercise it. And the same may be said of Mr. Justice Porter in Percy *v.* Millaudon, 20 Martin, 75. This qualification of the rule is also recognized in Stanton *et al. v.* Bell *et al.*, 2 Hawks, 145.

That the proper management of the boilers and machinery of a steamboat requires skill, must be admitted. Indeed, by the Act of Congress of August 30, 1852, great and unusual precautions are taken to exclude from this employment all persons who do not possess it. That an omission to exercise this skill vigilantly and faithfully, endangers, to a frightful extent, the lives and limbs of great numbers of human beings, the awful destruction of life in our country by explosions of steam boilers but too painfully proves. We do not hesitate, therefore, to declare that negligence in the care or management of such boilers, for which skill is necessary, the probable consequence of which negligence is injury and loss of the most disastrous kind, is to be deemed culpable negligence, rendering the owners and the boat liable for damages, even in case of the gratuitous carriage of a passenger. Indeed, as to explosion of boilers and flues, or other dangerous escape of steam on board steamboats, Congress has, in clear terms, excluded all such cases from the operation of a rule requiring gross negligence to be proved to lay the foundation of an action for damages to person or property.

The thirteenth section of the Act of July 7, 1838, 5 Stat. at Large, 306, provides: "That in all suits and actions against proprietors of steamboats for injury arising to persons or property from the bursting of the boiler of any steamboat, or the collapse of a flue, or other dangerous escape of steam, the fact of such bursting, collapse, or injurious escape of steam shall be taken as full *prima facie* evidence sufficient to charge the defendant, or those in his employment, with

negligence, until he shall show that no negligence has been committed by him or those in his employment."

This case falls within this section; and it is therefore incumbent on the claimants to prove that no negligence has been committed by those in their employment.

Have they proved this? It appears that the disaster happened a short distance above Benicia; that another steamer, called the "Wilson G. Hunt," was then about a quarter of a mile astern of the "New World," and that the boat first arriving at Benicia got from twenty-five to fifty passengers. The pilot of the "Hunt" says he hardly knows whether the boats were racing, but both were doing their best, and this is confirmed by the assistant pilot, who says the boats were always supposed to come down as fast as possible; the first boat at Benicia gets from twenty-five to fifty passengers. And he adds that at a particular place called "the slough" the "Hunt" attempted to pass the "New World." Fay, a passenger on board the "New World," swears that on two occasions before reaching "the slough" the "Hunt" attempted to pass the "New World," and failed; that to his knowledge these boats had been in the habit of contending for the mastery, and on this occasion both were doing their best. The fact that the "Hunt" attempted to pass the "New World" in "the slough" is denied by two of the respondents' witnesses, but they do not meet the testimony of Fay, as to the two previous attempts. Haskell, another passenger, says: "About ten minutes before the explosion I was standing looking at the engine; we saw the engineer was evidently excited, by his running to a little window to look out at the boat behind. He repeated this ten or fifteen times in a very short time." The master, clerk, engineer, assistant engineer, pilot, one fireman, and the steward of the "New World" were examined on behalf of the claimants. No one of them, save the pilot, denies the fact that the boats were racing. With the exception of the pilot and the engineer, they are wholly silent on the subject. The pilot says they were not racing. The engineer says: "We have had some little strife between us and the 'Hunt' as to who should get to Benicia first. There was an agreement made that we should go first. I think it was a trip or two before." Considering that the master says nothing of any such agreement, that it does not appear to have been known to any other person on board either boat, that this witness and the pilot were both directly connected with and responsible for the negligence charged, and that the fact of racing is substantially sworn to by two passengers on board the "New World," and by the pilot and assistant pilot of the "Hunt," and is not denied by the master of the "New World," we cannot avoid the conclusion that the fact is proved. And certainly it greatly increases the burden which the Act of Congress has thrown on the claimants. It is possible that those managing a steamboat engaged in a race may use all that care and adopt all those precau-

tions which the dangerous power they employ renders necessary to safety. But it is highly improbable. The excitement engendered by strife for victory is not a fit temper of mind for men on whose judgment, vigilance, coolness, and skill the lives of passengers depend. And when a disastrous explosion has occurred in such a strife, this court cannot treat the evidence of those engaged in it, and *prima facie* responsible for its consequences, as sufficient to disprove their own negligence, which the law presumes.

We consider the testimony of the assistant engineer and fireman, who are the only witnesses who speak to the quantity of steam carried, as wholly unsatisfactory. They say the boiler was allowed by the inspector to carry forty pounds to the inch, and that when the explosion occurred they were carrying but twenty-three pounds. The principal engineer says he does not remember how much steam they had on. The master is silent on the subject and says nothing as to the speed of the boat. The clear weight of the evidence is that the boat was, to use the language of some of the witnesses, doing its best. We are not convinced that she was carrying only twenty-three pounds, little more than half her allowance.

This is the only evidence by which the claimants have endeavored to encounter the presumption of negligence. In our opinion it does not disprove it; and consequently the claimants are liable to damages, and the decree of the District Court must be affirmed.

Mr. Justice DANIEL dissented.

McPADDEN *v.* NEW YORK CENTRAL R. CO.

44 N Y. 478. 1871.

APPEAL from a decision of the General Term of the Supreme Court in the seventh district upon exceptions there heard in the first instance, granting a new trial.

This action was brought to recover for injuries sustained by the plaintiff, while a passenger upon the defendant's road. The cause was tried at the Rochester Circuit, in January, 1865; and it appeared, among other things, that on the 5th day of January, 1864, the plaintiff took passage on a train at Rochester going westerly, intending to go to Knowlesville. The train stopped at Brockport, and there met a train coming east. About half a mile west of Brockport the two passenger cars of the train going west were thrown from the track, and the car in which the plaintiff was riding was overturned, and he was injured. The train going west was not under full headway, going at the rate of about twenty-five miles per hour. The train going east passed the place of the accident at the rate of twenty-five to thirty miles per hour.

The accident was caused by a broken rail, — a piece of the rail, about four feet in length, being broken in three or four pieces. All the witnesses who testified upon the subject testified that the rail was a good, sound, and perfect rail, and in all respects properly placed and fastened, and they attributed the breaking to the coldness of the weather, it being a very cold morning. A track watchman went over the track three miles west of Brockport, starting at three o'clock that morning, and a train followed him west in about an hour. He then returned over the road to Brockport, reaching there a little before six o'clock, a short time before the accident. After the train passed east, he had no time to go over the road again before this train went west. When he went over the road he found it in order. The plaintiff's witnesses testified that all the cars were off from the track but the locomotive. The defendant's witnesses testified that the passenger cars and the hind wheels of the baggage car were off the track. The conductor and engineer of the train going eastward testified that they did not notice any jolt at the place of the accident of their train, and that if the rail had been broken and displaced by their train they would have noticed it. The engineer of the train going west testified that he did not discover that any rail was displaced, and would have discovered it if one had been displaced before his engine passed over, and the conductor of this train testified that he could feel the jog when a rail was displaced. This testimony of the conductors and engineers was uncontradicted.

At the close of the evidence the counsel for the defendant moved for a nonsuit upon the ground that there was no proof of negligence or omission of duty on the part of the defendant, but that there was clear evidence that every precaution to insure safety to passengers had been taken. The counsel for the plaintiff then asked to go to the jury upon the question whether the rail was broken before the train going west came upon it. The court refused permission to him to do so, and nonsuited the plaintiff, and his counsel excepted, but did not request to go to the jury upon any other question.

The General Term made an order granting a new trial, and the defendant appealed from such order to this court, stipulating for judgment absolute in case the order should be affirmed.

Earl, C. The General Term granted a new trial, upon the ground that the judge, at the Circuit, should have submitted to the jury the question, whether the rail was broken before it was reached by the train going west carrying the plaintiff; and it held, if it was thus broken, that the defendant was liable, irrespective of any question of negligence, within the principle of the case of Alden *v.* The N. Y. C. R. R. Co., 26 N. Y. 102, upon the ground that it was bound to furnish a road adapted to the safe passage of trains, or, in other words, "a vehicle-worthy road."

I am obliged to differ with the General Term, for two reasons:

1st. If the rail was broken before it was reached by the train going west, it must have been broken by the train going east shortly before, and there is no evidence whatever that it was broken by that train. All the evidence tends to show that it was broken by the train going west. Such is the evidence of the conductors and engineers of both trains. There is no presumption that the rail was broken before this train reached it. It is unquestioned that the accident was caused by the broken rail, and if the plaintiff claimed that the defendant was liable, because the rail was broken before the train upon which he was riding reached it, it was incumbent upon him to prove it. This he failed to do; and if the jury upon the evidence had found it, it would have been the duty of the court to set the verdict aside as against the evidence.

But there is another reason. It does not appear that plaintiff's counsel, upon the trial, claimed that he had shown any negligence against the defendant, and he did not claim to go to the jury upon any such question, and the General Term did not grant a new trial upon the ground that there was any question of negligence in the case, which ought to have been submitted to the jury, but upon the ground above stated.

In the case of Alden *v.* The New York Central Railroad Company, the accident, by which the plaintiff was injured, was caused by the breaking of an axle of the car in which the plaintiff was riding, and it was held that a common carrier is bound absolutely, and irrespective of negligence, to provide roadworthy vehicles, and that the defendant was liable for the plaintiff's injuries, caused by a crack in the axle, although the defect could not have been discovered by any practicable mode of examination. That case was a departure from every prior decision and authority to be found in the books of this country or England, and, so far as I can learn, has never been followed anywhere out of this State. It was in conflict with the previous case, in the same court, of Hegeman *v.* The Western Railroad Corporation, 3 Kern. 9. The only authority cited to sustain the decision was the English case of Sharp *v.* Grey, 9 Bing. 457, and yet the decision has been distinctly repudiated in England, in the well-considered case of Readhead *v.* Midland Railway Co., first decided in the Queen's Bench, Law Reports, 2 Q. B. 412, and then on appeal in the Exchequer Chamber, Law Reports, 4 Q. B. 379, where it was unanimously affirmed in 1869; and the court held that the contract, made by a common carrier of passengers for hire, with a passenger, is to take due care (including in that term the use of skill and foresight) to carry the passenger safely, and that it does not contain or imply a warranty that the carriage in which he travels shall be in all respects perfect for its purpose and roadworthy. In the Exchequer Chamber Mr. Justice Smith, writing the opinion of the court, alludes to the case of Alden *v.* The New York Central Railroad Company, and dissents from it, and comments upon the

case of Sharp *v.* Grey, relied upon in that case, and he shows clearly that it was no authority for the broad doctrine laid down in that case. He says: "We have referred somewhat fully to this case, Sharp *v.* Grey, because it was put forward as the strongest authority in support of the plaintiff's claim, which can be found in the English courts, and because it was relied on by the judges of the Court of Appeals, in New York, in a decision which will be afterward referred to. But the case, when examined, furnishes no sufficient authority for the unlimited warranty now contended for. The facts do not raise the point for decision." Hence the case of Alden *v.* The New York Central Railroad Company has no foundation of authority, whatever, to rest on, and the only reason given for the decision is that the new rule adopted would be plainer and easier of application than the one that had been recognized and acted upon for hundreds of years. It was always supposed that there was a difference, founded upon substantial reasons, between the liability of the common carrier of goods and the common carrier of passengers. The former was held to warrant the safe carriage of the goods, except against loss or damage from the act of God or the public enemy; but the latter was held to contract only for due and proper care in the carriage of passengers.

I have thus commented upon and alluded to the case of Alden *v.* The New York Central Railroad Company, with no design to repudiate it as authority, but for the purpose of claiming that it is a decision which should not be extended. I am unwilling to apply it to every case that apparently comes within its principle; nor would I limit it to the car in which the passenger was riding. The whole train must be regarded as the vehicle; and the engine and all the cars attached together must be free from defect and roadworthy, irrespective of negligence. So far, and no farther, am I willing to regard that case as authority. Shall it be applied to steamboats and vessels, common carriers of passengers upon the ocean and our inland waters? Shall it apply to innkeepers, proprietors of theatres and other places of public resort, who invite the public into their buildings, for a compensation? And shall all such persons be held to an implied warranty that their buildings, with the appurtenances, are suitable and proper, and free from all defects which no foresight could guard against or skill detect? Shall it be applied to the roadbed of a railroad? If so applied, where shall it stop? It must also extend to the bridges, masonry, signals, and, in fact, to all the different parts of the system employed and used in the transport of passengers by railroad. And, as railroad companies are responsible for the skill and care of all their human agents, such an extension of that doctrine would make them substantial insurers of the safety of all their passengers, and thus practically abolish the distinction between the liability of the carriers of passengers and the carriers of goods. While such a rule would "be plain and easy of applica-

tion," I am not satisfied that it would be either wise or just. Railroads are great public improvements, beneficial to the owners, and highly useful to the public. There is a certain amount of risk incident to railroad travel which the traveller knowingly assumes; and public policy is fully satisfied when railroad companies are held to the most rigid responsibility for the utmost care and vigilance for the safety of travellers.

If, therefore, the jury had found that the rail was broken by the eastward-bound train, it would still have been a case of mere accident, caused without any want of proper care and vigilance on the part of the defendant, and the defendant would not have been liable.

I am, therefore, in favor of reversing the order of the General Term, and ordering judgment upon the nonsuit for the defendant, with costs.

Lott, Ch. C., and Leonard, C., delivered opinions in favor of reversal.

Order of the General Term reversed, with costs, and judgment upon the nonsuit ordered, with costs. Hunt, C., dissenting.

GRAND RAPIDS, etc., R. CO. *v.* HUNTLEY.

38 Mich. 537. 1878.

Trespass on the case. Defendant brings error.

Campbell, C. J. Suit was brought by Mrs. Huntley for personal injuries suffered on the 5th day of November, 1874, by reason of an accident caused by a passenger car being thrown from the track and upset. The testimony showed that the mischief was caused by the breaking of an axle containing a large flaw, within the wheel or near its edge. Those witnesses who made any actual examination found the flaw entirely within the axle, and covered by a small thickness of sound metal. The suit was tried in April, 1877, about two years and a half after the accident. Mrs. Huntley was injured in the shoulder, and claimed that the injury was permanent.

Testimony was introduced bearing upon the condition of the cars and track, and the speed of the train, as well as concerning the character of the injury. The principal questions arise upon the medical testimony and upon the charge; although some other points are presented.

. . . . . .

The principal remaining questions arise out of the rules of liability established by the charge.

The primary cause of the accident was the broken axle. Some error seems also to have been laid on the condition of the track and the rate of speed. So far as appears upon the record, we have not discovered any proper evidence to authorize these matters to be considered. There is no testimony from such persons as are qualified to give opinions on the subject that either the condition of the road or the speed indicated negligence. Whether the structure of the road is such as to warrant fast travel is not a question which usually belongs to ordinary witnesses, and it would be dangerous to allow a jury to act on its own suspicions or prejudices in such a matter. The road, if in such a condition as would be regarded as safe by railroad men of usual intelligence and experience, could not be complained of for any possible deficiencies which would not be regarded by competent persons as existing, nor could the rate of speed be properly held excessive without similar evidence from men of experience. It is a matter of daily occurrence in many parts of the country, and of occasional occurrence everywhere, for cars to be run at very high rates of speed on railway tracks. No particular rate can be assumed, without proof, to be dangerous.

The main question, however, relates to responsibility for the condition of the axle. It was held by the court below that no diligence or care in the railroad company could exempt them from want of care in the manufacturers of the cars and axles.

This doctrine is, we think, entirely incorrect. Carriers of freight are liable whether careful or not, for any act or damage not caused by the act of God, or of the public enemy. Their liability, therefore, does not arise from negligence or want of care. It arises from their failure to make an absolutely safe carriage and delivery, which they insure by their undertaking. The analogies of carriers of freight have nothing to do with passenger carriers. These are liable only when there has been actual negligence of themselves or their servants. If they exercise their functions in the same way with prudent railway companies generally, and furnish their road and run it in the customary manner which is generally found and believed to be safe and prudent, they do all that is incumbent upon them. M. C. R. R. *v.* Coleman, 28 Mich. 440; G. R. & I. R. R. *v.* Judson, 34 Mich. 506; Ft. Wayne, J. & S. R. R. *v.* Gildersleeve, 33 Mich. 133; M. C. R. R. *v.* Dolan, 32 Mich. 510. This general doctrine the court below laid down very clearly, but qualified it so as to make them absolutely responsible for the omissions or lack of skill or attention of the manufacturers from whom they made their purchases of stock, however high in standing and reputation as reliable persons.

There is no principle of law which places such manufacturers in the position of agents or servants of their customers. The law does not contemplate that railroad companies will in general make their own cars or engines, and they purchase them in the market, of per-

sons supposed to be competent dealers, just as they buy their other articles. All that they can reasonably be expected to do is to purchase such cars and other necessaries as they have reason to believe will be safe and proper, giving them such inspection as is usual and practicable as they buy them. When they make such an examination, and discover no defects, they do all that is practicable, and it is no neglect to omit attempting what is impracticable. They have a right to assume that a dealer of good repute has also used such care as was incumbent on him, and that the articles purchased of him which seem right are right in fact. Any other rule would make them liable for what is not negligence, and put them practically on the footing of insurers. The law has never attempted to hold passenger carriers for anything which they could not avoid by their own diligence.

The case of Richardson *v.* Great Eastern Railway Co., L. R. 1 C. P. Div. 342, Court of Appeals, is quite in point and establishes the doctrine as it has been fixed by the general understanding since the carrying of passengers has been the subject of legal discussion. That was a passenger case, depending on the doctrine of negligence as applied to defective trucks. The axle of a truck belonging to another company, brought on the line of the respondents to be forwarded, was broken by reason of a flaw which might have been discovered by a minute examination, but which was not discovered, in fact, by such an examination as was customary and reasonably practicable. It was held no negligence could be imputed for not making a more minute examination than was made. In that case the court also held that it was not within the province of a jury to lay down rules after their own opinion, which imposed duties beyond the usual practice of prudent railways. See also Daniel *v.* Metropolitan Railway Co., L. R. 5 H. of L. 45, upon the right of a railway company to assume there is no negligence in others over whom they exercise no control.

The injustice and illegality of holding passenger carriers to anything like a warranty of their carriages was very fully discussed and asserted in Readhead *v.* Midland Ry. Co., L. R. 4 Q. B. 379. The New York cases which were relied on upon the argument of the present cause were considered in the light of a large number of decisions, and disapproved, as we think, correctly. They entirely ignore the true ground of responsibility as depending on the actual negligence of the carrier. There is no such thing as implied negligence, when there is none, in fact.

We think the judgment erroneous, and it must be reversed with costs and a new trial be granted.

PERSHING *v.* CHICAGO, ETC., R. CO.

71 Iowa, 561. 1887.

On the eighth day of February, 1885, a passenger train on defendant's railway was derailed, as is supposed, by a broken rail, at a point near a bridge over a gully or ravine. When the train went upon the bridge, the wheels on one side passed outside of the guard-rail, and the bridge was broken down, and the car in which the plaintiff's intestate was riding as a passenger was thrown into the gully or ravine, and she received injuries which caused her death. This action was brought for the recovery of the damages sustained by her estate. There was a verdict and judgment for defendant, and plaintiff appeals.

REED, J. It is alleged in the petition that the injury was caused by the negligence of the defendant, and that its negligence consisted (1) in the manner in which its track and bridge were constructed and maintained, the latter being insufficient; and (2) in the manner in which the train was being run at the time of the accident. The evidence is not contained in the abstract, but it is recited in the "bill of exceptions" that plaintiff introduced evidence tending to prove the occurrence of the accident and injury, and that the deceased was not guilty of any contributory negligence, and that the accident was caused by the negligent manner in which the track and bridge were constructed and maintained, and the negligent manner in which the train was being run at the time, and by the insufficiency of the bridge, and that he then rested his cause; that the defendant thereupon introduced evidence tending to prove that its road, and said bridge, and its rolling stock, and its servants and agents, were in all respects such as were accepted by, and were in general use, and found to be sufficient and approved by the best and most skilfully managed railroads of the country, doing a like business under like circumstances with it; and the selection of its material, and the plan and construction of its roadway, track, bridges, and rolling stock, and the selection of its employees, servants, and agents, and the inspection and repairs of its road and machinery, and appliances connected with the operation of the road, were such as the best, most carefully, prudently, and skilfully managed railroads in the country exercise and require, doing a like business, and under like circumstances; and that the bridge went down, and that the car in which the intestate was riding was thrown into the ravine, by reason of the derailment of the train, at a point 75 feet from the bridge; that the ties, rails, and fastenings, and the ballast thereunder at that point, and between there and the bridge,

were in all respects such as had been found sufficient by the most skilfully and prudently managed railroads of the country, doing a like business, under similar circumstances; that the same were from time to time, and as frequently as by other railroads, inspected in the usual way of inspecting such appliances by the most carefully and prudently managed railroads of the country, by an employee of competent skill and experience in such matters; and that the rails and joint fastenings appeared sound, and all their supports sound and secure; and that there were no flaws or defects visible that could have been discovered by such inspection; and that the shock or blow which caused the bridge to fall was of unusual and extraordinary violence, and that the bridge would not otherwise have gone down, and that the guard-rails on the bridge were such as were usually and customarily used by the most skilfully managed railroads of the country, under like circumstances.

In rebuttal, plaintiff introduced evidence tending to prove that the bridge was not sufficient, either in plan or construction; that the guard-rails were not of sufficient size, and were not properly placed or fastened; that the joint fastenings at the point at which the derailment occurred were insufficient, and were broken prior to the occurrence of the derailment; and that the break might have been discovered, by a careful and proper inspection, before the passage of the train.

The errors assigned all relate to the instructions given by the court to the jury.

I. In the seventh, eighth, and thirteenth instructions, the jury were told, in effect, that the burden was on plaintiff to show that the injury was caused by the negligence of the defendant; but that, if he had established that the accident was attended by circumstances showing that it was caused by the defective construction of the roadway, bridge, track, or the fastenings of the rail at the point where the derailment occurred, or its train or cars, or by the management or running of the train, this would raise a presumption of negligence, and would cast upon defendant the burden of proving that it was not caused by any negligence or want of skill on its part, either in the construction or maintenance of its roadway, track, or bridge, or in the management of the train, or the condition of the cars, but that this presumption extended only to those portions of the track, machinery, or bridge which the circumstances of the accident indicated were possibly defective, and it was not required to prove that nothing about its entire train and roadway were defective; and that the burden cast upon it by proof of the happening of the accident, and the attending circumstances, only required it to show that, as to the matters which the circumstances indicated were the cause of the accident and injury, it had exercised due care; and that it was not required to satisfactorily explain the reason of the breaking of the rail, and the derailment of the train, and the

breaking down of the bridge, but was only required to prove that those things did not occur through any negligence on its part.

The point urged by counsel for appellant is that the instructions are erroneous, in that they limit the burden imposed upon defendant by the evidence of the occurrence of the accident, and the attendant circumstances, to proof merely that it had not been negligent in respect to those matters which the circumstances indicated were the cause of the injury. Their position is that the presumption which arises upon proof of the happening of the accident is not a mere presumption of negligence as to some specific matter, but is a presumption of general negligence on the part of the carrier; or, in other words, they insist that the presumption is that he is legally liable for the injury, and that this presumption can be overcome only by proof that it was caused by inevitable accident, and that it follows necessarily from this that he must account for the accident, and show that he was free from all negligence in the matter.

The rule which casts the burden of proof on the carrier is a rule of evidence having its foundation in considerations of policy. It prescribes the quantum of proof which the passenger is required to produce in making out his case originally, and he is entitled to recover on that proof, unless the carrier can overcome the presumption which arises under the rule from the facts proven. Caldwell *v.* Steamboat Co., 47 N. Y. 282; Thomp. Carr. 209.

The rule undoubtedly requires the carrier to prove his own freedom from negligence as to the cause of the injury. But that, it appears to us, is the doctrine of the instructions. The immediate cause of the injury to plaintiff's intestate was the breaking down of the bridge, and the consequent precipitation of the car into the ravine; and this was occasioned by the blow or concussion by the derailed train. In seeking for the cause of the injury, then, it became necessary to inquire as to the cause of the derailment of the train, and whether there was any defect in the track, or roadway, or bridge, or in the cars or machinery of the train, or any negligence in the management of it at the time; for the circumstances indicated unmistakably that the cause of the accident was to be found in some of these matters. They constituted the subject of the inquiry as to this branch of the case, and defendant very properly confined its proof as to the diligence and care it had exercised, to that subject.

As there was nothing to indicate that any other matter could have contributed to the accident, it could not be required to show that it had been careful as to other matters. Such evidence would clearly have been immaterial, and the holding of the instructions is that it was not required to go beyond the cause of the inquiry in making proof of care and diligence. The holding that it was not required to give a satisfactory explanation of the cause of the breaking of the rail and bridge is supported by Tuttle *v.* Chicago, R. I. & P. R'y Co., 42 Iowa, 296.

II. The following instructions were given by the Circuit Court: "It is a duty of a railway company, employed in transporting passengers, to do all that human care, vigilance, and foresight can *reasonably* do, consistent with the mode of conveyance and the practical operation of the road, in providing safe coaches, machinery, tracks, rails, angle-bars, or splices, bridges and roadway, and in the conduct and management of its trains for the safety of its passengers, and to keep the same in good repair. The utmost degree of care which the human mind is capable of inventing or producing, is not required; but the highest degree of care, vigilance, and foresight that is reasonably practicable in the conduct and management of its road and business is required. . . . Common carriers of passengers are held to the very highest degree of care and prudence that human care, vigilance, and foresight could *reasonably* do, which is consistent with the practical operation of their road, and the transaction of their business; yet they are not absolute insurers of the safety of their passengers; and if you find that the defendant exercised all reasonably practical care, diligence, and skill in the construction, preservation, inspection, and repairs of its road-bed, bridges, track, rails, angle-bars, or splices, in the management and operation of its road, and of the train, at the time of the accident alleged and shown to have occurred, and that the accident could not have been prevented by the use of the utmost practical care, diligence, and skill consistent with the practical operation of its road, and the transaction of its business, then plaintiff cannot recover in this action."

The rule which has been uniformly recognized and enforced in this State, is that the carrier, in the conduct and management of his business, and as to all the appliances made use of in the business, is bound to exercise the highest degree of care and diligence for the convenience and safety of his passengers, and he is held liable for the slightest neglect. Frink *v.* Coe, 4 G. Greene, 555; Sales *v.* Western Stage Co., 4 Iowa, 574; Bonce *v.* Dubuque St. R'y Co., 53 *id.* 278; Kellow *v.* Central Iowa R'y Co., 68 *id.* 470. It is insisted that the instructions are in conflict with this rule. The position of counsel is that, by the use of the words *reasonable*, *reasonably practicable*, and *reasonably practical* in the instructions, the care for the safety of the passenger required of the carrier is lowered, and he is required to exercise reasonable or ordinary care only. It will be observed, however, that these words, as they are used in the instructions, while they to some extent limit the degree of care required of the carrier, have special reference to the practical operation of the railroad, and the conduct of the business. When the instructions are scrutinized, it will be found that the doctrine announced by them is that defendant was bound to exercise the highest degree of care and diligence which was reasonably consistent with the practical operation of its railroad, and the conducting of its business; and this is right. It is doubtless true that precautions

could be used in the construction and operation of railroads that would prevent many of the accidents which occur as they are constructed and operated. It sometimes happens that a derailed train is precipitated from a high embankment, and the lives of its passengers endangered or destroyed. Accidents of that character could be avoided by constructing all railroad embankments of such a width that a derailed train or car would come to a stop before reaching the declivity. But this would add immensely to the cost of constructing such improvements, and, if required, would in many cases prevent their construction entirely. If passenger trains were run at the rate of ten miles per hour, instead of from twenty-five to forty miles, it is probable that all danger of derailment would be avoided. But railroad companies could not reasonably be required to adopt that rate of speed. Their roads are constructed with a view to rapid transit, and the travelling public would not tolerate the running of trains at that low speed. When it is said that they are held to the highest degree of care and diligence for the safety of their passengers, it is not meant that they are required to use every possible precaution; for that, in many instances, would defeat the very objects of their employment. There are certain dangers that are necessarily incident to that mode of travel, and these the passenger assumes when he elects to adopt it. But all that is meant is that they should use the highest degree of care that is reasonably consistent with the practical conduct of the business, and that is the doctrine of the instructions, and it is abundantly sustained by the authorities. Indianapolis & St. L. R'y Co. *v.* Horst, 93 U. S. 291; Dunn *v.* Grand Trunk R. R., 58 Me. 187; Hegeman *v.* Western R. R., 13 N. Y. 9; Kansas Pacific R. R. *v.* Miller, 2 Colo. 442; Wood, R. R. 1049–1054.

III. The eleventh, twelfth, and fourteenth instructions given by the court are as follows: —

"The degree of care required of defendant in the selection of its materials, the plan and construction of its roadway, track, bridges, and rolling stock, in the selection of its employees, servants, and agents, and in the inspection and repairs of its road, and the machinery and appliances connected with the operation of the same, is such as the best, most carefully, prudently, and skilfully managed railroads of the country exercise and require, doing a like business, and under like circumstances.

"The high degree of care hereinbefore referred to, and required of defendant, embraces its roadway, track, bridges, and rolling stock, and the selection of its employees, servants, and agents. In supplying materials for and in constructing its roadway, track, bridges, and rolling stock, it was required to exercise that high degree of care to see that materials used were amply sufficient, and of such quality, size, pattern, as were accepted by and in general use, *and found to be sufficient, and approved* by the best and most skilfully managed

railroads of the country, doing a like business with defendant. In the selection of train-men, and in the management of its train, it was bound to exercise that high degree of care, and to provide men of sufficient experience, skill, and prudence to run such train safely, as far as was practicable; and it was bound, also, in like manner, to see that, in the actual management of the train at the time of the accident, the train-men exercised a like degree of care and skill in managing and running the train safely in all respects, so as to avoid injury to the passengers. If defendant failed in any of these respects, and such failure was the cause of the injury complained of, it was negligent, and is liable.

"If you find that the rails which were broken were made by a manufacturer of good repute, were made upon the approved method of manufacturing rails, were properly tested by the proper known and usually applied tests then in practical use, and had been on the track for several years, and had successfully stood the strain of numerous passing trains without in any manner affecting their quality or strength, so far as could be seen by proper examination, carefully and skilfully made; if, at the time of the accident, they were placed and lying securely on sound ties, with good angle-bars or splices at the ends, with sufficient ballast under the ties, with all their connections and supports well adjusted; if they had been subjected to a daily inspection in the most approved and customary way of inspecting such appliances by the most careful and best managed railroads in the country, by some servant of competent skill and experience in such matters, and said rails appeared then sound, and all these connections and supports sound and secure; then if there were no flaws or defects visible, or that could have been discovered by such approved and customary inspection, made in the manner hereinbefore explained, — then the defendant was not negligent with reference to said rails."

Some of the members of the court think that the eleventh instruction is erroneous, but we unite in the conclusion that, if it should be conceded to be erroneous, the plaintiff could not have been prejudiced by it. The doctrine of the instruction is that the degree of care required of defendant in the selection of plans and materials for its roadways, bridges, and appliances was such as was exercised by the best and most skilfully and carefully managed railroads in the country, under like circumstances. The objection urged against it is that it treats the practices of the class of railroads named, in the matters in question, as affording an absolute standard of duty as to those matters, thus, in effect, making the very practices which are called in question the law of the case. We admit the force of the objection. But the twelfth instruction was drawn with special reference to the facts of the case, and in it the jury were told, in effect, that defendant was bound, not only to select such plans and material for the construction of its road and appliances as were in use by the

best and most skilfully conducted roads of the country, but that such materials and plans must have been found sufficient by the other roads. This is clearly right. When a plan of construction, and the materials made use of, have been found by actual experience to be sufficient and safe, other roads, whose business is to be carried on under like circumstances, are warranted in adopting them. To hold otherwise would be to hold that railroad companies, in the construction and operation of their roads, could not avail themselves of the experience of others, and that the construction and operation of every road must, to a great extent, be a matter of experiment. With this rule distinctly laid down as applicable to the facts of the case, we think the jury could not have been misled by the eleventh instruction, conceding that it is erroneous. This concession, however, must be understood as being made only for the purpose of the argument, for a majority of the court are of the opinion that the instruction is not erroneous. We think, also, that the fourteenth instruction is correct.

IV. In another instruction the jury were told that defendant "was not required to so construct its bridge that it would resist an unusual and extraordinary shock of a derailed train, running at regular speed, and striking it with great force." After the jury had been considering the case for some time, they were again brought into court, and the court gave them further instructions on that subject, which very materially modified the one quoted above. In the additional instructions they were told, in effect, that the defendant was required to take into account, in constructing and maintaining its bridges, the fact that accidents might occur in the operation of its road, and to construct its bridges with reference thereto; and that it was held to a very high degree of care in that respect. As thus modified, the instruction quoted affords plaintiff no just ground of complaint.

We have found no ground in the record upon which we think we ought to disturb the judgment, and it will be

Affirmed.

GLEESON *v.* VIRGINIA MIDLAND R. CO.

140 U. S. 435. 1891.

In error to the Supreme Court of the District of Columbia.

This is an action for damages, brought in the Supreme Court of the District of Columbia. It appears from the bill of exceptions that at the trial the evidence introduced by the plaintiff tended to show that in January, 1882, he was a railway postal-clerk, in the service of the United States post-office department; that on Sunday,

the 15th of that month, in the discharge of his official duty, he was making the run from Washington to Danville, Va., in a postal-car of the defendant, and over its road; that in the course of such run the train was in part derailed by a landslide which occurred in a railway cut, and the postal-car in which the plaintiff was at work was thrown from the track upon the tender, killing the engineer and seriously injuring the fireman; and that the plaintiff, while thus engaged in performing his duty, was thrown violently forward by the force of the collision, striking against a stove and a letter-box, three of his ribs being broken, and his head, on the left side, contused, which injuries are claimed to have permanently impaired his physical strength, weakened his mind, and led to his dismissal from his office, because of his inability to discharge its duties. Defence was made by the company under these propositions: That the landslide was caused by a rain which had fallen a few hours previous, and therefore was the act of God; that it was a sudden slide, caused by the vibration of the train itself, and which, therefore, the company was not chargeable with, since it had, two hours before, ascertained that the track was clear; and that the injury resulted from the plaintiff's being thrown against the postal-car's letter-box, for which the company was not responsible, since he took the risk incident to his employment. At the close of the testimony, the court, having given to the jury certain instructions in accordance with the requests of the plaintiff, charged the jury, at defendant's request, as follows: "(1) The burden of proof is on the plaintiff to show that the defendant was negligent, and that its negligence caused the injury. (2) The jury are instructed that the plaintiff, when he took the position of a postal-clerk on the railroad, assumed the risk and hazard attached to the position, and if, in the discharge of his duties as such, he was injured through the devices in and about the car in which he was riding, properly constructed for the purpose of transporting the mails, the railroad is not liable for such injury, unless the same were caused by the negligent conduct of the company or its employees. (3) The court instructs the jury that, while a large degree of caution is exacted generally from railway companies in order to avert accidents, the caution applies only to those accidents which could be prevented or averted by human care and foresight, and not to accidents occurring solely from the act of God. If they believe that the track and instruments of the defendant were in good order, its officers sufficient in number and competent, and that the accident did not result from any deficiency in any of these requirements, but from a slide of earth caused by recent rains, and that the agents and servants of the company had good reason to believe that there was no such obstruction in its track, and that they could not, by exercise of great care and diligence, have discovered it in time to avert the accident, then they should find for the defendant. (4) If the jury believe from the evidence that the defendant's

instruments, human and physical, were suitable and qualified for the business in which it was engaged; that the accident complained of was caused by the shaking down of earth which had been loosened by the recent rains, and that the earth was shaken down by the passing of this train, — then the accident was not such an act of negligence for which the defendant would be responsible, and the jury should find for the defendant." The counsel for the plaintiff objected to the granting of the first of these prayers, and asked the court to modify it by adding the words "but that the injury to the plaintiff upon the car of the defendant, if the plaintiff was in the exercise of ordinary care, is *prima facie* evidence of the company's liability." But the court refused to modify the said prayer, and the plaintiff duly and severally excepted to the granting of each one of said prayers on behalf of the defendant, and to the refusal of the court to modify the said first prayer as requested. The jury, so instructed, found for the defendant, and judgment was rendered accordingly. That judgment having been affirmed by the court in general term, 5 Mackey, 356, this writ of error was taken.

LAMAR, J. It will be most convenient in the decision of this case to consider the third instruction first. The objections made to it are three: (1) "It assumes that the accident was caused by an act of God, in the sense in which that term is technically used." It appears that the accident was caused by a land-slide, which occurred in a cut some 15 or 20 feet deep. The defendant gave evidence tending to prove that rain had fallen on the afternoon of Friday and on the Saturday morning previous; and the claim is that the slide was produced by the loosening of the earth by the rain. We do not think such an ordinary occurrence is embraced by the technical phrase "an act of God." There was no evidence that the rain was of extraordinary character, or that any extraordinary results followed it. It was a common, natural event; such as not only might have been foreseen as probable, but also must have been foreknown as certain to come. Against such an event it was the duty of the company to have guarded. Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, sudden deaths and illnesses, have been held to be "acts of God;" but we know of no instance in which a rain of not unusual violence, and the probable results thereof in softening the superficial earth, have been so considered. In Dorman *v.* Ames, 12 Minn. 451, (Gil. 317), it was held that a man is negligent if he fail to take precautions against such rises of high waters as are usual and ordinary, and reasonably to be anticipated at certain seasons of the year; and we think the same principle applies to this case. Ewart *v.* Street, 2 Bailey, 157, 162; Moffat *v.* Strong, 10 Johns. 11; Steamboat Co. *v.* Tiers, 24 N. J. Law, 697; Railway Co. *v.* Braid, 1 Moore P. C. (N. S.) 101. (2) The instruction does not hold the defendant "responsible for the condition of the sides of the cut made by it in

the construction of the road, the giving way of which caused the accident." We think this objection is also well taken. The railroad cut is as much a part of the railroad structure as is the fill. They are both necessary, and both are intended for one result, which is the production of a level track over which the trains may be propelled. The cut is made by the company no less than the fill; and the banks are not the result of natural causes, but of the direct intervention of the company's work. If it be the duty of the company (as it unquestionably is) in the erection of the fills and the necessary bridges to so construct them that they shall be reasonably safe, and to maintain them in a reasonably safe condition, no reason can be assigned why the same duty should not exist in regard to the cuts. Just as surely as the laws of gravity will cause a heavy train to fall through a defective or rotten bridge to the destruction of life, just so surely will those same laws cause land-slides and consequent dangerous obstructions to the track itself from ill-constructed railway cuts. To all intents and purposes a railroad track which runs through a cut where the banks are so near and so steep that the usual laws of gravity will bring upon the track the *débris* created by the common processes of nature is overhung by those banks. Ordinary skill would enable the engineers to foresee the result, and ordinary prudence should lead the company to guard against it. To hold any other view would be to overbalance the priceless lives of the travelling public by a mere item of increased expense in the construction of railroads; and, after all, an item, in the great number of cases, of no great moment.

In a late case in the Queen's Bench division, — Tarry *v.* Ashton, 1 Q. B. Div. 314, — two out of three judges declared in substance that a man who, for his own benefit, suspends an object, or permits it to be suspended, over the highway, and puts the public safety in peril thereby, is under an absolute duty to keep it in such a state as not to be dangerous. The facts of the case were these: The defendant became the lessee and occupier of a house from the front of which a heavy lamp projected several feet over the public foot-pavement. As the plaintiff was walking along in November, the lamp fell on her, and injured her. It appeared that in the previous August the defendant employed an experienced gas-fitter to put the lamp in repair. At the time of the accident a person employed by defendant was blowing the water out of the gas-pipes of the lamp, and in doing this a ladder was raised against the lamp-iron, or bracket, from which the lamp hung; and on the man mounting the ladder, owing to the wind and wet, the ladder slipped, and he, to save himself, clung to the lamp-iron, and the shaking caused the lamp to fall. On examination it was discovered that the fastening by which the lamp was attached to the lamp-iron was in a decayed state. The jury found that there had been negligence on the part of the defendant personally; that the lamp was out of repair through

general decay, but not to the knowledge of the defendant; that the immediate cause of the fall of the lamp was the slipping of the ladder; but that, if the lamp had been in good repair, the slipping of the ladder would not have caused the fall. Upon this it was held by Lush and Quain, JJ., that the plaintiff was entitled to a verdict on the ground that if a person maintains a lamp projecting over the highway for his own purposes, it is his duty to maintain it so as not to be dangerous to persons passing by; and if it causes injuries, owing to a want of repair, it is no answer on his part that he had employed a competent man to repair it. 1 Thomp. Neg. 346, 347. The case of Kearney *v.* Railroad Co., L. R. 6 Q. B. 759, 762, (in the Exchequer Chamber), cited in the brief of counsel for plaintiff in error, is directly in point. In that case the plaintiff had been injured while walking along a public highway, by a brick which fell from a pier of the defendant's bridge. A train had just passed, and the counsel for the defendant submitted that there was no evidence of negligence. The court (Kelly, Chief Baron) says: "There can be no doubt that it was the duty of the defendants, who had built this bridge over the highway, to take such a care that, where danger can be reasonably avoided, the safety of the public using the highway should be provided for. The question, therefore, is whether there was any evidence of negligence on the part of the defendants; and by that we all understand such an amount of evidence as to fairly and reasonably support the finding of the jury. The lord chief justice, in his judgment in the court below, said *res ipsa loquitur*, and I cannot do better than to refer to that judgment. It appears without contradiction that a brick fell out of a pier of the bridge without any assignable cause except the slight vibration caused by a passing train. This, we think, is not only evidence, but conclusive evidence, that it was loose; for otherwise so slight a vibration could not have struck it out of its place. . . . The bridge had been built two or three years, and it was the duty of the defendants from time to time to inspect the bridge, and ascertain that the brick-work was in good order, and all the bricks well secured." The principle of those decisions seems to us to be applicable to this case. If such be the law as to persons who, for their own purposes, cause projections to overhang the highway not constructed by them, *a fortiori* must it be the law as to those who, for their own purposes of profit, undertake to construct the highway itself, and to keep it serviceable and safe, yet who allow it to be practically overhung, from considerations of economy or through negligence. We think the case of Railroad Co. *v.* Sanger, 15 Grat. 237, to which we are referred by counsel for plaintiff in error, is strongly illustrative of the principle in this case, to which it bears a close resemblance. Some rocks had been piled up alongside of the track for the purpose of ballast, and some of them got upon the track, causing the injury. In rendering its opinion the court says: "Combining in themselves the ownership

as well of the road as of the cars and locomotives, they are bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and all the subsidiary arrangements necessary to the safety of the passengers. And, as accidents as frequently arise from obstructions on the track as perhaps from any other cause whatever, it would seem to follow, obviously, that there is no one of the duties of a railroad company more clearly embraced within its warranty to carry their passengers safely, as far as human care and foresight will go, than the duty of employing the utmost care and diligence in guarding their road against such obstructions." See, also, McElroy *v.* Railroad Corp., 4 Cush. 400; Hutch. Carr. p. 524; Bennett *v.* Railroad Co., 102 U. S. 577. This view of the obligation of the company of course makes it immaterial that the slide was suddenly caused by the vibration of the train itself. It is not a question of negligence in failing to remove the obstruction, but of negligence in allowing it to get there.

We are also of the opinion that it was error to refuse to modify the first instruction for the defendant as requested by the plaintiff. Since the decisions in Stokes *v.* Saltonstall, 13 Pet. 181, and Railroad Co. *v.* Pollard, 22 Wall. 341, it has been settled law in this court that the happening of an injurious accident is, in passenger cases, *prima facie* evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The rule announced in those cases has received general acceptance, and was followed at the present term in Coasting Co. *v.* Tolson, 139 U. S. 551. The defendant seeks to uphold the action of the court in refusing the modification prayed for, by distinguishing the case at bar. It attempts to make two distinctions: (1) That the operation of the rule is confined to cases "where the accident results from any defective arrangement, mismanagement, or misconstruction of things over which the defendant has immediate control, and for the management, service, and construction of which it is responsible, or where the accident results from any omission or commission on the part of the railroad company with respect to these matters entirely under its control." (2) That the injury from an act of God is established as a fact, wherefore the presumption of negligence from the occurrence of the accident cannot arise. Neither of these attempted distinctions is sound, since, as has been shown, the defect was in the construction of that over which the defendant did have control, and for which it was responsible, and since the slide was not caused by the act of God, in any admissible sense of that phrase. Moreover, if these distinctions were sound, still, as a matter of correct practice, the modification should have been made. The law is that the plaintiff must show negligence in the defendant.

This is done *prima facie* by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility, or of the act of God, it is still none the less true that the plaintiff has made out his *prima facie* case. When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matters of defence. And it is for the jury to say, in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defence, between the accident and the alleged exonerating circumstances. But when the court refuses to so frame the instructions as to present the rule in respect to the *prima facie* case, and so refuses on either of the grounds by which the refusal is sought to be supported herein, it leaves the jury without instructions to which they are entitled to aid them in determining what were the facts and causes of the accident, and how far those facts were or were not within the control of the defendant. This is error. Judgment reversed, and cause remanded, with direction to order a new trial, and to take further proceedings not inconsistent with this opinion.

Brewer, J., dissented from the opinion and judgment in this case on the ground that it is in contravention of the long-established rules as to what may be considered on an incomplete record.

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b. *Negligence or wrong of servants.*

RAILROAD CO. *v.* WALRATH.

38 Ohio, 461. 1882.

Error to the District Court of Hamilton County.

Walrath brought suit in the Superior Court of Cincinnati against the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company, to recover damages for an injury alleged to have been sustained while he was a passenger on the company's road. He paid to the company his fare from Cleveland to Cincinnati, and also, after the train had started, paid for a berth in a car of the Woodruff Sleeping-Car Company, which car formed part of the train. After riding in his proper seat in the sleeping-car an hour or more, the upper berth came down, striking him, as he alleges, on the head, causing injury to the spinal cord, and ultimately paralysis. This, he avers, was without fault on his part, and by reason of the negligence of the railroad company, as well in using defective appliances as in the management of the same. There was evidence that the

berth had never fallen before or afterward, and that, on examination after the accident, no defect could be discovered in its construction.

The case was heard upon petition, answer, reply, and testimony, and a verdict for $6,000 was found, upon which judgment was rendered. The judgment was affirmed in the District Court. This petition in error was filed by the railroad company to reverse the judgments.

Refusing to charge in terms that no presumption of negligence arose, from the fact that an accident occurred to Walrath while travelling as a passenger in the sleeping-car, and that, if there was no defect in the road, or the car, or the mechanism used, the burden to show negligence of the railroad company's employees was on him, the court charged the jury, among other things, as follows:

"The burden of proof is on the plaintiff to show that he was injured by the defendant's negligence, either in not providing safe and suitable cars, or in not properly inspecting and taking care of said cars. A mere statement that a person was injured while riding on a railway, without any statement of the character, manner, or circumstances of the injury, does not raise a presumption of negligence on the part of the railway company. But if the character, manner, or circumstances of the injury are also stated, such statement may raise, on the one hand, a presumption of such negligence, or, on the other, a presumption that there was no such negligence. If the plaintiff was in fact injured while sitting in his proper place, by the falling on to his head of the upper berth, while said upper berth ought to have remained in place above, such fact raises a presumption in this case of negligence, for which the defendant is liable. If you find that there was no defect in the road, or in the car, or the mechanism used, yet, if upon the evidence in this case, you find it reasonable to presume that the accident happened by reason of the upper berth not having been properly fastened in place, or by reason of the persons having charge of the car having failed to observe that it had become loosened, if such insecure condition would be observed by proper diligence, you have a right so to presume, and you would then find the defendant guilty of negligence. If, on the other hand, in such case, you find it equally reasonable to presume that the fastening of the berth was loosened by some other person, not those in the employment of the defendant, and such insecure condition would not be observed by proper diligence on the part of the persons having charge of the car, you have the right so to presume, and in that case would find the plaintiff failed to make out a case of negligence against the defendant. . . . The plaintiff is entitled to damages for injury traceable to the defendant's fault, but not for injury caused by his own act."

Exception was taken to specified portions of this charge.

The railroad company also insisted that it was not liable for the negligence of the servants of the sleeping-car company, but the

charge of the court was adverse to the claim, and exception was taken.

Olney, C. J. Two questions are presented: first, as to the liability of the railroad company for injury to a passenger travelling on one of its trains in a coach of a sleeping-car company; secondly, as to the presumption arising from proof of the injury.

1. In Southern Express Co. *v.* Railway Co., 10 Fed. Rep. 210, Miller, J., said that "the express business is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized;" "that it is the duty of every railroad company to provide such conveyances, by special cars or otherwise, attached to their freight or passenger trains, as are required for the safe and proper transportation of this express matter on their roads;" "that under these circumstances there does not exist, on the part of the railroad company, the right to open and inspect all packages so carried;" and "that, when matter is so confided to the charge of an agent or messenger (of the express company), the railroad company is no longer liable to all the obligations of a common carrier, but that when loss or injury occurs, the liability depends upon the exercise of due care, skill, and diligence on the part of the railroad company." And see Penn. Co. *v.* Woodworth, 26 Ohio St. 585.

Counsel for plaintiff in error argue in this case that sleeping-cars have become recognized as so far necessary to the comfort and convenience of passengers by railway, that railway companies may be compelled, in like manner, to attach the coaches of sleeping-car companies to their trains, where they have failed to provide their own cars for such purpose, in which case there should be a corresponding modification of the liability of the railroad company, and that whether the arrangement between the companies be enforced or conventional, the railroad company should not be liable for injury to passengers resulting solely from negligence of the agents of the sleeping-car company.

In support of this view, attention is called to the fact that in Penn. Co. *v.* Roy, 102 U. S. 451, where the liability of the railroad company for an injury received in a car of the Pullman Palace Car Co. was asserted, Harlan, J., lays stress on the fact that the railroad company had published and circulated cards, which were in such form as to induce the belief that the sleeping-car was under the management and control of the railway company. But, on examination of the whole opinion, we find there was no intention to place the liability on such narrow ground; and we have no hesitancy in saying that, in the absence of notice that the company will not be liable for defective appliances in the sleeping-car or negligence of servants of the sleeping-car company, a passenger may well assume that the whole train is under one general management. Thorpe *v.* Railway Co., 76 N. Y. 402; Kinsley *v.* Railroad Co., 125 Mass.

54. How far a railway company may, by agreement with a sleeping-car company, known to the passenger, exonerate itself for liability for such injuries, is a question concerning which we express no opinion.

2. As to the presumption stated in the charge, counsel for plaintiff in error say that there was no evidence that the injury resulted from defect in the car or any part of it. Hence, the injury was occasioned by the negligence of the porter in securing the berth in its place, or by the interference of some other person with the fastenings of the berth. This statement is probably correct. Now, in charging that the burden was on Walrath to show the injury resulted from the negligence of the defendant below, and that he could only recover for negligence traceable to the defendant's fault, the court virtually charged that he was required to show that he was without fault. This being shown, we think the court might then well say, under the circumstances, that the negligence of the defendant might be presumed. We are aware that upon this subject the authorities are in some conflict. Roscoe's N. P. Ev. (14th ed.) 695; Thompson on Car. Pas. 209; Schouler on Bailments, 642; 2 Wait's Act & Def. 90; Pierce on Rail. (ed. of 1881) 298; Johnson *v.* Railroad Co., 20 N. Y. 65; Readhead *v.* Midland Railw. Co., 4 L. R. Q. B. 379; Hyman *v.* Nyle, 6 Q. B. D. 685; Great West. Railw. *v.* Fawcett, 1 Moore (P. C.) 101, 116; cf. Czech *v.* General Steam Nav. Co., 3 L. R. C. P. 14. But the general question was carefully considered in Railroad Co. *v.* Mowery, 36 Ohio St. 418, and we think the principle of that case sustains the court below in the charge given and in refusing the charge requested. Railroad Co. *v.* McMillan, 37 Ohio St. 554, was an action for killing a horse on the company's road, and has no application. Whether the sentence next to the last, in the portion of the charge set forth in the statement of this case, was not more favorable to the railroad company than was warranted, we need not determine.

Judgment affirmed.

MARION *v.* CHICAGO, ETC. R. CO.

59 Iowa, 428. 1882.

ACTION to recover for a personal injury. The plaintiff avers in his petition that he climbed upon one of the defendant's freight trains while in motion; that he did so without a ticket and without the consent of the company; that one of the defendant's brakemen, in the course of his employment, negligently and wilfully forced him from the train while in motion, and caused him to fall through a bridge, from which he received the injury complained of.

The defendant for answer denied all the allegations of the petition not admitted, and did not admit that one of its brakemen, in the course of his employment, negligently or wilfully forced the plaintiff from the train. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

ADAMS, J. There was evidence tending to show that the conductor was vested with the sole power to determine who should be allowed to ride upon the train and who should be removed therefrom. Upon this point the defendant asked the court to give an instruction in these words: "Acts done by an employee while engaged in the service of his employer are not necessarily done in the course of his employment as the term is used in law, and if an employee, while engaged in the service of his principal to perform a special service, goes beyond or outside the scope of his employment, and in doing so injures one to whom, like the plaintiff in this case, the employer owes no duty, the employer is not liable." The court refused to give this instruction, and gave an instruction in these words: "Even though the instructions and rules of the company placed the matter of the removal of trespassers, or non-paying passengers, from the trains under the immediate charge and discretion of the conductor, and it was the duty of the brakeman to put off such persons only by the direction of the conductor as his superior, the defendant is not relieved from liability simply because in this instance the brakeman acted without orders or direction from the conductor. But if the brakeman, not as a part of his duty as an employee of the defendant, but for the gratification of his own feelings, wilfully or maliciously assaulted the plaintiff, and in this assault the plaintiff fell to the ground, then the defendant is not liable. The point you are to observe is this: that as the defendant owed the plaintiff no duty as a common carrier, therefore, unless the brakeman, as an employee of the company engaged in operating the train, acted for the purpose of putting him off and freeing the train from him as a trespasser, the defendant is not liable for this act." The giving of this instruction and the refusal to give the instruction asked are assigned as errors.

The rule is familiar that an employer is liable for the torts of an employee only where they are committed in the course of his employment. The difficulty has been to determine what acts should be deemed within the course of his employment. If in this case the conductor had forced the plaintiff from the train while in motion and while crossing a bridge, the act very clearly would, under the evidence, be deemed to be in the course of his employment, and that too even if it were shown that he had been expressly instructed to eject no person from the train when in motion, and especially when crossing a place as dangerous as a bridge. In one sense, the specific act would not be in the course of his employment, but his general

employment to remove trespassers from the train would be sufficient to render the company liable.

But it appears to us that the act of an employee of a railroad company in removing a trespasser from a train cannot be considered the act of the company, unless he was engaged generally to remove trespassers, or specifically to remove the particular trespasser. The court below appears to have thought otherwise. The instruction given proceeds upon the theory that where a person is employed to do one thing, and he volunteers to do another, his act shall nevertheless be deemed to be within the scope of his employment *if his purpose was to serve his employer.* But in our opinion the purpose of the employee is not in a case like the one at bar material. The court, we think, was misled by a distinction which has been drawn by courts in a different class of cases. Where the question is as to whether the employer is liable for a wilful injury done by an employee it is sometimes important to inquire whether the employee's purpose was to serve his employer by the wilful act. Illinois Central Railroad Co. *v.* Downey, 18 Ill. 259; Wright *v.* Wilcox, 19 Wend. 343; Moore *v.* Sanborn, 2 Mich. 519; Croft *v.* Alison, 4 B. & Ald. 590; Johnson *v.* Barber, 5 Gilman, 425; Foster *v.* Essex Bank, 17 Mass. 479. The rule is that an employer is not liable for a wilful injury done by an employee, though done while in the course of his employment, unless the employee's purpose was to serve his employer by the wilful act. Where the employee is not acting within the course of his employment, the employer is not liable, even for the employee's negligence, and the mere purpose of the employee to serve his employer has no tendency to bring the act within the course of his employment. Where a female servant having authority to light fires in a house, but not to clean the chimneys, lit a fire for the sole purpose of cleaning a chimney, it was held that her employer was not liable for an injury caused by her negligence in lighting the fire. Mackenzie *v.* McLeod, 10 Bing. 385. See, also, Towanda Coal Co. *v.* Heenan, 86 Pa. St. 418.

In our opinion the court erred in the instruction given and in refusing the instruction asked by the defendant. Several other questions are presented, but in the view which we have taken of the case they will probably not arise upon another trial.

Reversed.

RAMSDEN *v.* BOSTON, ETC. R. CO.

104 Mass. 117. 1870.

TORT for an assault and battery.

. . . . . .

Trial in the Superior Court, before REED, J., who made the following report to this court: —

This is an action of tort. The pleadings make a part hereof. The plaintiffs introduced evidence tending to show that the female plaintiff got on board the defendant's cars at Newton Corner, for the purpose of going to West Newton in an evening train; that she paid the fare to the conductor; that afterwards the conductor demanded the fare again; that she said she had before paid it; that the conductor told her she lied; that the conversation between them was in a loud tone; that the attention of people in the cars was attracted by it; that she was confused and shamed and excited by it; that the conductor demanded of her that she should give him her parasol to keep as security, or as payment for the fare; that she refused; that he took hold of it, and after somewhat of a struggle, took it away from her; and that, by reason of this, the said plaintiff, a few days afterwards, was prematurely delivered of a child, and had suffered much in health.

"After the testimony for the plaintiffs was concluded, the judge announced to the counsel that at the conclusion of the case, whenever that should be, the rulings would be as follows; and that, after hearing them, the counsel upon the one side or the other might proceed or not with the case to the jury, as they might elect. These are the rulings: 'Upon the pleadings, the action is tort in the nature of trespass for an assault. In order to maintain the action, the plaintiffs must show that an assault was committed upon the female plaintiff. A conductor, by virtue of his implied authority as such, that being the only authority shown in this case, has no right to seize articles of property belonging to a passenger for the purpose of thus enforcing the payment of fare. And if a conductor does this, or attempts to do this, and, in so doing, and for the sole purpose of seizing such property, commits an assault on a passenger, the corporation is not responsible in trespass for such acts.' Upon the announcement of these rulings, with the foregoing statement made by the judge to the counsel, the plaintiff's counsel consented to a verdict for the defendants."

Gray, J. A railroad corporation is liable, to the same extent as an individual would be, for an injury done by its servant in the course of his employment. Moore *v.* Fitchburg Railroad Co., 4 Gray, 465. Hewitt *v.* Swift, 3 Allen, 420. Holmes *v.* Wakefield, 12 Allen, 580. If the act of the servant is within the general scope of his employment, the master is equally liable, whether the act is wilful or merely negligent; Howe *v.* Newmarch, 12 Allen, 49; or even if it is contrary to an express order of the master. Philadelphia & Reading Railroad Co. *v.* Derby, 14 How. 468.

The conductor of a railroad train, from the necessity of the case, represents the corporation in the control of the engine and cars, the regulation of the conduct of the passengers as well as of the subordinate servants of the corporation, and the collection of fares. He may eject a passenger for not paying fare. O'Brien *v.*

Boston & Worcester Railroad Co., 15 Gray, 20. It has been adjudged by this court that if, in the exercise of his general discretionary authority, he wrongfully ejects a passenger who has in fact paid his fare; or uses excessive and unjustifiable force in ejecting a passenger who has not paid his fare, and injures him by a blow or kick, or by compelling him to jump off while the train is in motion,— in either case, the corporation is liable. Moore *v.* Fitchburg Railroad Co., Hewitt *v.* Swift, and Holmes *v.* Wakefield above cited.

We are all of opinion that this case cannot be distinguished in principle from those just mentioned. The use of unwarrantable violence in attempting to collect fare of the plaintiff was as much within the scope of the conductor's employment as the exercise or threat of unjustifiable force in ejecting a passenger from the cars. Neither the corporation nor the conductor has any more lawful authority to needlessly kick a passenger or make him jump from the cars when in motion, than to wrest from the hands of a passenger an article of apparel or personal use, for the purpose of compelling the payment of fare. Either is an unlawful assault; but if committed in the exercise of the general power vested by the corporation in the conductor, the corporation as well as the conductor is liable to the party injured. In Monument National Bank *v.* Globe Works, 101 Mass. 59, Mr. Justice Hoar said, "No corporation is empowered by its charter to commit an assault and battery; yet it has frequently been held accountable in this Commonwealth for one committed by its servants."

The ruling of the learned judge who presided at the trial, that if the conductor, in seizing, or attempting to seize, articles of property belonging to a passenger, for the purpose of thus enforcing the payment of fare, committed an assault upon the passenger, the corporation was not responsible for such acts, was therefore erroneous.

Verdict set aside.

CHICAGO, ETC. R. CO. *v.* FLEXMAN.

103 Ill. 546. 1882.

MR. CHIEF JUSTICE CRAIG. This was an action brought by James Flexman, against appellant, to recover damages for personal injuries inflicted upon him while a passenger in appellant's cars, by a brakeman in the employ of the company.

The plaintiff, as appears from the evidence, procured a ticket from Hoopeston to Milford, and took passage on a freight train which carried passengers. Soon after plaintiff entered the car he laid down in a seat and went to sleep. When the train arrived at Milford he was notified by the conductor. As plaintiff was about

to leave the car he missed his watch, and supposed it had been stolen. He then refused to leave the train until he recovered the watch, and the conductor consented that he might remain on the train until they should reach Watseka. After the train had started, a passenger assisted plaintiff in making a partial search for the watch, but it was not then found. The passenger then inquired of plaintiff who he thought had his watch, to which he replied, "That fellow," pointing at the brakeman. Immediately after the remark was made the brakeman struck plaintiff in the face with a railroad lantern, inflicting the injuries complained of. These are substantially the facts, over which there is no controversy by the parties.

After the plaintiff had introduced all his testimony, the defendant entered a motion to exclude the evidence from the jury, and asked for an order directing the jury to find a verdict for defendant. The court denied the motion, and the defendant excepted. This decision of the court presents the question whether the facts proven, conceding them to be true, constitute a cause of action against the defendant.

The point is made that as plaintiff only paid fare to Milford he ought not to be regarded as a passenger on the train after he left that place. We do not regard this position well taken. The conductor did not demand or require fare from the plaintiff; had he done so, no doubt the required amount would have been paid. As the conductor failed to call for fare, it must be regarded as waived. At all events, we have no hesitation in holding that the railroad company occupied the same position towards plaintiff that it would have occupied had he paid his fare.

But it is said, "that if the plaintiff was injured by a servant of appellant, it was an act outside of the employment of the servant who committed the act, and not in furtherance of his employment by the master." This position is predicated upon McManus *v.* Cricket, 1 East, 106, and like cases which have followed it. In the case cited Lord Kenyon said: "It is laid down by Holt, Ch. J., as a general position, 'that no master is chargeable with the acts of his servant but when he acts in the execution of the authority given him.' Now, when a servant quits sight of the object for which he is employed, and without having in view his master's orders pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and, according to the doctrine of Lord Holt, his master will not be answerable for such act." The doctrine announced is no doubt correct when applied to a proper case. If, for example, a conductor or brakeman in the employ of a railroad company should wilfully or maliciously assault a stranger, — a person to whom the railroad company owed no obligation whatever, — the master in such a case would not be liable for the act of the servant; but when the same doctrine is invoked to control a case where an assault has been made by the servant of the company

upon a passenger on one of its trains, a different question is presented, — one which rests entirely upon a different principle.

What are the obligations and duties of a common carrier toward its passengers? In Keokuk Northern Line Packet Co. *v.* True, 88 Ill. 608, it was held that a steamboat company, as a carrier of passengers for hire, is, through its officers and servants, bound to the utmost practicable care and diligence to carry its passengers safely to their place of destination, and to use all reasonably practicable care and diligence to maintain among the crew of the boat, including deck hands and roustabouts, such a degree of order and discipline as may be requisite for the safety of its passengers. The same rule that governs a steamboat company must also be applied to a railroad company, as the duties and obligations resting upon the two are the same, or any other company, which carries passengers for hire. In Goddard *v.* Grand Trunk Ry. Co., 57 Me. 202, in discussing this question, the court says: "The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully; and if he intrust the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. . . . He must not only protect his passengers against the violence and insults of strangers and co-passengers, but, *a fortiori*, against the violence and insults of his own servants. If this duty to the passenger is not performed, — if this protection is not furnished, — but, on the contrary, the passenger is assaulted and insulted through the negligence of the carrier's servant, the carrier is necessarily responsible." In Bryant *v.* Rich, 106 Mass. 180, where the plaintiff, a passenger on a steamboat, was assaulted and injured by the steward and some of the table waiters, the defendant, as a common carrier, was held liable for the injury. In Croaker *v.* Chicago and Northwestern Ry. Co., 36 Wis. 657, where the conductor of a railroad train kissed a female passenger against her will, the court, in an elaborate opinion, held the railroad company liable for compensatory damages. It is there said: "We cannot think there is a question of the respondent's right to recover against the appellant for a tort which was a breach of the contract of carriage." In Shirley *v.* Billings, 8 Bush, 147, where a passenger on defendant's boat was assaulted and injured by an officer on the boat, the defendant was held liable. See, also, McKinley *v.* Chicago and Northwestern R. R. Co., 44 Iowa, 314, and N. O., St. L. and C. R. R. Co. *v.* Burke, 53 Miss. 200. Many other authorities holding the same doctrine might be cited, but we do not regard it necessary. It is true there are authorities holding the opposite view, but we do not think they declare the reason or logic of the law, and we are not prepared to follow them.

The appellant was a common carrier of passengers. As such it was not an insurer against any possible injury that a passenger might receive while on the train, but the company was bound to

furnish a safe track, cars, and machinery of the most approved quality, and place the trains in the hands of skilful engineers and competent managers, — the agents and servants were bound to be qualified and competent for their several employments. Again, the law required appellant, as a common carrier, to use all reasonable exertion to protect its passengers from insult or injury from fellow-passengers who might be on the train, and if the agents of appellant in charge of the train should fail to use reasonable diligence to protect its passengers from injuries from strangers while on board the train, the company would be liable. So, too, the contract which existed between appellant as a common carrier and appellee as a passenger was a guaranty on behalf of the carrier that appellee should be protected against personal injury from the agents or servants of appellant in charge of the train. The company placed these men in charge of the train. It alone had the power of removal, and justice demands that it should be held responsible for their wrongful acts towards passengers while in charge of the train. Any other rule might place the travelling public at the mercy of any reckless employee a railroad company might see fit to employ, and we are not inclined to establish a precedent which will impair the personal security of a passenger.

We are of opinion that the evidence showed a legal cause of action in plaintiff, and the court did not err in overruling the motion to exclude the evidence from the jury. Two instructions given for the plaintiff have been somewhat criticised, but we think they were in the main correct.

The judgment will be affirmed.

FICK *v.* CHICAGO, ETC. R. CO.

68 Wis. 169. 1887.

Action to recover damages for injuries occasioned by an assault upon the plaintiff by one of the defendant's employees. The complaint alleges that the plaintiff applied at the station at Wilton for a ticket to Norwalk, and handed to the person in the ticket office fifty cents to take therefrom the price of the ticket, which was twenty cents; that such person handed to him the proper ticket, but only returned ten cents in change; that the plaintiff having called attention to the mistake, the said agent or employee refused to return the balance, came out of the ticket office in an angry manner, and passed to the platform; that the plaintiff again requested such agent to return the change, and that thereupon the agent assaulted and struck him.

The answer alleged that the plaintiff with two or three companions, all grossly drunk, entered the station at Wilton and commenced an assault upon one E. W. Davis, who was then and there engaged in the business of mail carrier from the post-office at Wilton to the trains of the defendant, and that the said Davis resisted as he lawfully might. Otherwise the answer denies the allegations of the complaint.

The jury returned a special verdict. The facts found therein will sufficiently appear from the opinion. The jury also assessed the plaintiff's damages at $200. Both parties moved for judgment on the special verdict. The motion of the plaintiff was granted, and from the judgment entered accordingly, the defendant appealed.

Cole, C. J. The plaintiff had purchased a ticket at the ticket office at Wilton, for his transportation to Norwalk, so the relation of carrier and passenger existed at the time of the assault. It is needless to say that the company and its agents owed him fair and proper treatment while this relation existed. The jury found that one Fred E. Davis was the station agent at Wilton when the ticket was purchased; that Edward W. Davis was employed at Wilton to carry the mail from the trains to the post-office, and was employed in no other capacity; that at the time in question the plaintiff purchased of Edward W. Davis, temporarily in the ticket office at Wilton, by permission of Fred E. Davis, a ticket to Norwalk, the price of which was twenty cents, and tendered him fifty cents in payment thereof; that Edward W. Davis returned to the plaintiff too small an amount of change, and informed him that they had no change and would either send it to him or hand it to him when he came again; that Edward W. Davis committed the first assault upon the plaintiff at this time; and that the plaintiff was intoxicated.

Upon these simple facts the conduct of the employee, Edward W. Davis, in assaulting the plaintiff, would appear to be wholly indefensible and without any legal excuse. The plaintiff had given him money to pay for his ticket, and he was entitled to have his correct change returned. It was natural that he should ask for it and persist in demanding it. The agent had no possible right or justification for assaulting him because he did insist upon the correct amount of change being returned. Of course, the defendant owed the plaintiff the duty of treating him respectfully and properly. Certainly it was bound to protect him against the violent acts or misconduct of its agents. There would probably be no controversy as to the correctness of this view of the law, or as to the liability of the defendant for the wilful act of a servant while acting in the course of his employment.

It is said that Edward W. Davis was not the station agent at Wilton, but was merely employed to carry the mails from the trains to the post-office, and was employed in no other capacity. But he was in the ticket office, sold the plaintiff a ticket, and received pay

therefor. It is alleged in the complaint that the plaintiff went to the station for the purpose of taking passage on the train due in a few minutes, and purchased a ticket of an employee in charge of the office. Now, while it may be true that Edward W. Davis was not the regular ticket agent, yet under the circumstances he must be regarded as authorized to issue the ticket. The special verdict finds that at this time the "fracas" occurred, or the unlawful assault was committed. Now, to say that Edward W. Davis was a servant of the defendant in selling the ticket and receiving pay for it, but while in the act of refusing to return the proper change and in making the assault, was acting outside the course of his employment, is refining too much upon the transaction. It is not as though the fracas had occurred at a subsequent time and place disconnected with the act of selling the ticket and making change. Of course, the rule is familiar that the master is liable for the torts of his servant only when they are committed in the course of his employment, and we do not intend to disregard that rule here. It is often difficult to determine what acts should be deemed within the course of the employment; but it seems to us, upon the facts, that the assault made upon the plaintiff is one for which the defendant is liable. It would be unjust to hold that the defendant, which was bound to use all due diligence to carry the plaintiff safely to his destination, was not bound to protect him against the violent act of its servant under the circumstances of the case. True, the jury, in answer to the fourteenth question, find that the striking of the plaintiff by Edward W. Davis was not done by him in the course of his employment. But this, in view of the other findings, amounts only to a conclusion of law, and is not controlling as to the fact. It is like the question presented in Hogan *v.* C., M. & St. P. R. Co., 59 Wis. 139, where it was held that, if the special findings by the jury and the averments of the complaint conclusively show that the defendant was free from any negligence causing the injury complained of, a finding in the verdict that the defendant was guilty of such negligence will be treated merely as an erroneous conclusion of law, and will have no weight in determining what judgment should be entered. So here, where the other findings show that Edward W. Davis was acting in the course of his employment when he committed the unlawful act complained of, the fourteenth finding must be treated as an erroneous conclusion of law, which can have no weight in determining what judgment shall be entered.

c. *Acts of fellow-passengers or others.*

PUTNAM *v.* BROADWAY, ETC. R. CO.

55 N. Y. 108. 1873.

ACTION by Ellen S. Putnam, as administratrix, against the Broadway and Seventh Avenue Railroad Company to recover for the death of Avery D. Putnam, plaintiff's intestate, who was killed by William Foster, the deceased and Foster being at the time fellow-passengers on defendant's street car.

It appeared that Putnam, in company with two ladies, was riding in the car, when Foster, who was intoxicated, got on the car and rode quietly on the front platform. He afterward went inside and made insulting remarks and signs to the ladies. Putnam called the conductor to keep "this man quiet." The conductor told Foster to "sit down and be quiet," and went back to the rear platform. Foster then threatened Putnam with violence, in a tone of voice so low that the conductor did not hear. Foster went again upon the front platform and remained quiet. When the car stopped to allow Putnam and the ladies to leave, Foster seized the car hook, and running to the back platform, assaulted Putnam as he was assisting his companions to alight, and struck him two blows, from the effects of which Putnam subsequently died. Plaintiff obtained judgment, which was affirmed at general term. The defendant appealed to this court.

ALLEN, J. The questions presented upon this appeal are founded upon exceptions to the refusal to nonsuit the plaintiff at the close of the trial. If the evidence, upon any view that can be taken of it, entitled the plaintiff to a verdict, the judgment must be affirmed. The case was submitted to the jury with great fairness, and with accurate instructions as to the law, if there was in truth any evidence of neglect of duty, or want of care on the part of the servants and agents of the defendant to which the injury to and death of the plaintiff's intestate could legally be attributed.

The cases bearing upon the liability of railway companies, and other carriers of human beings as passengers for hire, for any defect in their roadways, carriages, and other vehicles of transportation, any neglect or want of care by themselves, their agents or servants in the performance of the service undertaken, and for injuries caused by or resulting directly from the acts of the carrier or his servants, either to the passenger or third persons, may be laid out of view, except as they serve to indicate the stringency and extent of the liability imposed by law upon carriers, and the extreme

care and diligence required of them, in all that concerns their own acts and the agencies and means employed by them. The acts, neglects, and omissions complained of here, upon which the action is based, do not come within either class of cases referred to. The passenger was carried in a safe and proper manner, and there is no complaint of injury from any defect in the means of conveyance, or any act or omission of duty on the part of the servants of the company in respect to the plaintiff's intestate personally. The wrong and injury complained of is the wanton and unprovoked as well as unlooked-for attack of a fellow-passenger, resulting in the death of the individual assailed, and the defendant is sought to be charged for the resulting damages on the ground that the servants and agents of the company, in charge of the car, negligently and improperly omitted to exercise police powers with which they are invested for the protection of well-disposed and peaceable passengers.

There is no such privity between a railway company and a passenger as to make it liable for the wrongful acts of the passenger upon any principle. Pittsburgh, F. W. & C. R. Co. *v.* Hinds, 53 Penn. St. 512 [615]. But a railroad company has the power of refusing to receive as a passenger, or to expel any one who is drunk, disorderly, or riotous, or who so demeans himself as to endanger the safety or interfere with the reasonable comfort and convenience of the other passengers, and may exert all necessary power and means to eject from the cars any one so imperilling the safety, or annoying others; and this police power the conductor, or other servant of the company in charge of the car or train, is bound to exercise with all the means he can command, whenever occasion requires. If this duty is neglected without good cause, and a passenger receives injury, which might have been reasonably anticipated or naturally expected, from one who is improperly received, or permitted to continue as a passenger, the carrier is responsible. Pittsburgh, F. W. & C. R. Co. *v.* Hinds, *supra;* Flint *v.* Norwich and N. Y. Transportation Co., 34 Conn. 554; 6 Blatch. C. C. 158. In the case first cited, a passenger was seriously injured by a large body of drunken and riotous persons, who came upon the train in defiance of the conductor in charge; and the court *in banc* held that, upon the evidence in that case, the only question which should have been submitted to the jury was whether the conductor did all he could to quell the riot and eject the rioters, and that if he did not the company was liable. The judge at *nisi prius* having submitted other questions, to wit, whether the conductor allowed improper persons on the train, and whether he allowed more persons on the train than was proper, a verdict for the plaintiff was set aside, and a *venire de novo* ordered. In the other case, the action was for an injury received by the plaintiff, a passenger on the defendant's steamboat, from the falling and consequent discharge of a loaded musket, by one of a great number of riotous and drunken soldiers engaged in

an affray, and occupying a part of the boat assigned to passengers, the plaintiff being suffered to enter the boat and pass to this part of it without any warning from the officers of the boat, or others, of the presence of these soldiers, and the defendants making no effort to preserve the peace or remove the offenders. Upon conflicting evidence the jury found for the plaintiff. Judge Shipman, in his charge to the jury, instructed them that "the defendants were bound to exercise the utmost vigilance in maintaining order, and guarding the passengers against violence, from whatever source arising, which might reasonably be anticipated, or naturally be expected to occur in view of all the circumstances, and of the number and character of the persons on board." This, as a rule of duty and liability, is in strict analogy and consistent with the rules by which the liability of common carriers of persons for hire is determined in other cases, and seems to be well expressed and properly limited. It may be conceded that Foster, the individual who inflicted the injury resulting in the death of the plaintiff's intestate, was drunk when he came on the car; but so long as he remained quietly by the driver on the platform, neither entering the car, nor molesting or annoying the passengers in any way, there was no occasion for removing him, and the conductor would not have been justified in refusing to permit him to remain as a passenger. The fact that an individual may have drank to excess will not, in every case, justify his expulsion from a public conveyance. It is rather the degree of intoxication, and its effects upon the individual, and the fact that, by reason of the intoxication, he is dangerous or annoying to the other passengers, that gives the right or imposes the duty of expulsion.

While Foster remained on the platform of the car, neither interfering with or noticing the other passengers, there was nothing to indicate to the conductor that his presence was offensive to the passengers, or that there was danger of harm to any one from him. There was during that time no occasion, and would have been no propriety, in causing his removal from the car. He did, however, thereafter make himself peculiarly obnoxious to the other passengers, and by his conduct and demeanor grossly insult and annoy them, and gave occasion for the exercise of the power of removal, had the conductor seen fit, or been called upon to exercise it; and had he continued his annoying practices, the conductor would have been faithless to his duty had he suffered him to remain on the car. After Foster came into the car and insulted and intimidated the females under the protection of the deceased, the latter appealed to the conductor, not to exclude Foster from the car, but to make him be quiet, and the conductor directed him to sit down and be quiet, and he did thereupon take a seat on the opposite side of the car from the females, and near the deceased, and after remaining there a short time left the car, and took his place on the front platform, the

front door of the car being closed, and, during the residue of the passage to Forty-sixth Street, gave no occasion of complaint, so far as appears. He was during that time peaceable and inoffensive. During this latter part of the ride there was no occasion for removing him from the car, unless the occasion and a necessity for such removal was furnished by his previous conduct, showing that he was a dangerous or improper person to remain. He had ceased to address or in any way to insult or annoy the females, upon being requested by the conductor to sit down and be quiet; and his ready compliance with that request, and his taking his place soon thereafter on the platform, and proceeding quietly and peaceably on his journey, was some evidence that there was no reason to apprehend a renewal of his insults in that direction, and justified the conductor in at least giving him the benefit of a further probation. This was precisely in accord with the suggestion of the deceased; neither he nor the conductor apprehending any serious harm or injury, certainly not a wanton and murderous attack upon any one with a dangerous weapon. It is true, that on taking his seat, he did not observe the strictest rules of propriety, and, by putting his feet on the seat, violated good taste and good manners; but it was not an offence of which the passengers could very seriously complain, or which essentially violated their rights, so long as there was abundant room for all, and there was no indecency in the position. This breach of good manners certainly did not tend to show that he was a dangerous man, and was condoned by his subsequent withdrawal from the seat and the body of the car entirely. It is also in evidence that, while seated near the deceased, he directed abusive language to him, and made threats indicating an intent to do him some bodily harm before he left the car. But all this was in an undertone, and, so far as appears, was unheard by the conductor, occupying his proper place on the rear platform, and neither the deceased nor any one else called the attention of the conductor to it. It was probably treated with indifference by the deceased and all who heard it, and regarded as the maudlin and senseless gabble of a drunken man, unworthy of notice, and incapable of creating any apprehension of danger or harm. But be this as it may, there is no evidence to justify an inference that the conductor did hear, or could have heard or known of the abuse or threat, so that to him they were not evidence that he was an unsafe and dangerous man, or that there was any reason to apprehend injury to the other passengers from him or his acts.

The conductor was only called upon to act upon improprieties or offences witnessed by him, or made known to him in some other way, and the defendants can only be charged for neglect of some duty arising from circumstances of which the conductor was cognizant, or of which he ought, in the discharge of his duties as conductor, to have been cognizant.

There was no evidence tending to show that the conductor was in fault for not removing the person of Foster from the car. He exerted his police powers by causing him to desist from his offensive acts and approaches toward the females, and supposed that he had done all that was necessary to preserve the peace and keep good order upon the car, to secure the other passengers against further annoyance, as well as all that the deceased asked him to do. If the peace could be preserved and the quietness and comfort of the passengers could be secured, as he supposed he had done, without the expulsion of the offender, the conductor could hardly have been called upon to proceed to extremities and put the latter from the car by force. An unnecessary resort to force, in ejecting a passenger from the car, might have given the passengers, male as well as female, more pain and annoyance than would the mere presence of a drunken man, and possibly might have seriously imperilled their persons. There was no evidence of any neglect of duty on the part of the conductor in omitting to remove the person of Foster from the cars; and whatever may be the duties or powers of the driver, except as he is in subjection to the conductor, there is no evidence that he had any notice or knowledge of any impropriety of conduct or the threatening language on the part of Foster, except as he must have witnessed what passed before Foster entered the car. There is no evidence that he had knowledge of what transpired within the car; and after Foster's return to the platform there was nothing, so far as appears, to excite alarm, or create apprehension of danger or disturbance or annoyance of any kind. There was an entire absence of evidence of any connection or complicity of the driver with Foster, or that the driver was responsible for the possession by the latter of the iron instrument with which the blows were inflicted that caused the death of Putnam. There was no proof from whence or of whom Foster obtained it, and none to show that the driver either acquiesced in or assented to the taking of it by Foster, or that he knew that Foster had it. There was no evidence of negligence or omission of duty, or want of proper care and vigilance on the part of the servants and agents of the company in preserving order and keeping the peace on the cars, and protecting the passengers, to be submitted to the jury; most certainly, none connected with the attack upon and death of the intestate, or to which it can be legally or logically traced. The rule cannot be better or more concisely expressed than as stated by Judge Shipman in Flint *v.* Norwich & N. Y. Transportation Co., *supra:* "That for any neglect or omission of duty in the preservation of order and the removal of dangerous and offensive persons by the owner of a public conveyance for the transportation of passengers, or his servants or agents, the carrier is liable for any injury to other passengers which might reasonably be anticipated, or naturally be expected to occur in view of all the circumstances, and of the number and character of the

persons on board." It does not follow and cannot be presumed that because a man is drunk, and is, in that condition, offensive to others, as well by his demeanor as in his appearance, that he is a dangerous man, and that his presence imperils the safety of others; that because he is drunk he may violently assault or murder others without provocation.

If there was anything in the condition, conduct, appearance, or manner of Foster from which the jury could reasonably infer that there was reason to expect or anticipate an attack upon the deceased, or any other passenger, either while upon the car or in the act of leaving, the facts authorizing such inference should have been proved, and knowledge of them brought home to the conductor. The injury to and death of Mr. Putnam was immediately and directly caused by the murderous attack of Foster, and the carriage of the murderer by the defendant had no connection with and did not cause the act or directly contribute to it.

It is said in McGrew *v.* Stone, 53 Penn. St. 436, that the general rule is that a man is answerable for the consequences of a fault which are natural and probable; but if his fault happen to concur with something extraordinary and not likely to be foreseen, he will not be answerable.

Bovill, Ch. J., in Sharp *v.* Powell, L. R., 7 C. P. 253, uses this language: "No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom; but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shown that he knows or has reasonable means of knowing that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person." The law ordinarily looks only to the proximate cause of an injury, in holding the wrong-doer liable to an action; and if the damage is not the probable consequence of a wrongful act, it is not the proximate cause, so as to make the wrong-doer liable. See Marsden *v.* City and County Assurance Co., L. R., 1 C. P. 232; Bigelow *v.* Reed, 51 Me. 325; Railroad Co. *v.* Reeves, 10 Wall. 176 [110]. This is the rule in cases of *tort*, when the conduct of the defendant cannot be considered so morally wrong or grossly negligent as to give a right to vindictive or exemplary damages. Baldwin *v.* U. S. Tel. Co., 45 N. Y. 744; s. c. 6 Am. R. 165; Boyle *v.* Brandon, 13 M. & W. 738.

The assault by Foster upon the deceased could not have been foreseen, and it was not the reasonable or probable consequence of the omission of the conductor to eject him from the car, and upon principle as well as upon authority the injury was too remote to charge the defendant for the damages. In Scott *v.* Shepherd, 2 W. Bl. 892, Cooke *v.* Swan, 12 Johns. 381, and Vandenburgh *v.* Truax, 4 Den. 464, the injuries were held to be the natural and direct result of the

conduct of the party charged, although he did not intend the particular injury which followed.

There was no evidence to carry the case to the jury, and the motion for a nonsuit should have been granted.

The judgment must be reversed, and a new trial granted.

PITTSBURGH, FORT WAYNE & CHICAGO R. CO. *v.* HINDS.

53 Penn. St. 512. 1866.

This action was brought, December 5th, 1865, by Parker Hinds and Martha Jane his wife, against The Pittsburgh, Fort Wayne & Chicago Railway Company, for injury to her whilst riding on the defendant's train.

Woodward, C. J. The action is for an injury sustained by the plaintiff's wife whilst she was a passenger in the cars of the defendants; and what is peculiar in the case is the fact that the injury was not occasioned by defective machinery, or cars or road, or by anything that pertained properly to their business as transporters, but was caused by the fighting of passengers among themselves. Drunken and quarrelsome men intruded into the ladies' car in great numbers whilst the train stopped at Beaver Station, and in the disgraceful fight which ensued among them, the plaintiff's arm was broken, and for this the railroad company is sued. Had the suit been against the riotous men who did the mischief, the right of recovery would have been undoubted, for it is not more the duty of railroad companies to transport their passengers safely than it is the duty of passengers to behave in a quiet and orderly manner. This is a duty which passengers owe both to the company and to fellow-passengers, and when one is injured by neglect of this duty the wrong-doer should respond in damages. But in such a case is the company liable?

There is no such privity between the company and the disorderly passenger as to make them liable on the principle of *respondeat superior*. The only ground on which they can be charged is a violation of the contract they made with the injured party. They undertook to carry the plaintiff safely, and so negligently performed this contract that she was injured. This is the ground of her action — it can rest upon no other. The negligence of the company, or of their officers in charge of the train, is the gist of the action, and so it is laid in the declaration. And this question of negligence was submitted to the jury in a manner of which the company have no reason to complain. The only question for us as a Court of Error,

therefore, is whether the case was, upon the whole, one that ought to have been submitted. The *manner* of the submission having been unexceptionable, was there error in the *fact* of submission?

The learned judge reduced the case to three propositions. He said the plaintiff claims to recover —

1st. Because the evidence shows that the conductor did not do his duty at Beaver Station, by allowing improper persons to get on the cars.

2d. Because he allowed more persons than was proper under the circumstances to get on the train, and to remain upon it.

3d. That he did not do what he could and ought to have done to put a stop to the fighting upon the train, which resulted in the plaintiff's injury.

As to the first of the above propositions the judge referred the evidence to the jury, especially with a view to the question whether the disorderly character of the men at Beaver Station had fallen under the conductor's observation so as to induce a reasonable man to apprehend danger to the safety of the passengers.

The evidence on this point was conflicting, but it must be assumed that the verdict has established the conclusion that the conductor knew that drunken men were getting into the cars. Let it be granted also as a conclusion of law that a conductor is culpably negligent who admits drunken and quarrelsome men into a passenger car. What then?

The case shows that an agricultural fair was in progress in the vicinity of Beaver Station; that an excited crowd assembled at the station rushed upon the cars in such numbers as to defy the resisting power at the disposal of the conductor; and that the man who commenced the fight sprung upon the platform of the hindmost car after they were in motion.

Of what consequence, then, was the fact that the conductor knew these were improper passengers? It is not the case of a voluntary reception of such passengers. If it were, there would be great force in the point, for more improper conduct could scarcely be imagined in the conductor of a train than voluntarily to receive and introduce among quiet passengers, and particularly ladies, a mob of drunken rowdies. But the case is that of a mob rushing with such violence and in such numbers upon the cars as to overwhelm the conductor as well as the passengers.

It is not the duty of railroad companies to furnish their trains with a police force adequate to such emergencies. They are bound to furnish men enough for the ordinary demands of transportation, but they are not bound to anticipate or provide for such an unusual occurrence as that under consideration.

When passengers purchase their tickets and take their seats they have a right to expect that the train is furnished with the proper hands for the conduct of the train, but not with a police force sufficient to quell mobs

by the wayside. No such element enters into the implied contract. It is one of the incidental risks which all who travel must take upon themselves, and it is not reasonable that a passenger should throw it upon the transporter.

These observations are equally applicable to the second proposition. The conductor did not "allow" improper numbers, no more than improper characters, to get upon the cars. He says he took no fare from them, and in no manner recognized them as passengers. To allow undue numbers to enter a car is a great wrong, almost as great as knowingly to introduce persons of improper character, and in a suitable case we would not hesitate to chastise the practice severely. But this is not a case in which the conductor had any volition whatever in respect either of numbers or characters. He was simply overmastered, and the only ground upon which the plaintiff could charge negligence upon the company would be in not furnishing the conductor with a counter force sufficient to repel the intruders. This was not the ground assumed by the plaintiff, and it would scarcely have been maintainable had it been assumed.

Taking the case as it is presented in the evidence, we think it was error for the court to submit the cause to the jury on these two grounds. But upon the third ground we think the cause was properly submitted.

If the conductor did not do all he could to stop the fighting there was a negligence. Whilst a conductor is not provided with a force sufficient to resist such a raid as was made upon the train in this instance, he has, nevertheless, large powers at his disposal, and if properly used, they are generally sufficient to preserve order within the cars, and to expel disturbers of the peace. His official character and position are a power. Then he may stop the train and call to his assistance the engineer, the fireman, all the brakemen, and such passengers as are willing to lend a helping hand, and it must be a very formidable mob, indeed, more formidable than we have reason to believe had obtruded into these cars, that can resist such a force. Until at least he has put forth the forces at his disposal, no conductor has a right to abandon the scene of conflict. To keep his train in motion and busy himself with collecting fares in forward cars whilst a general fight was raging in the rearmost car, where the lady passengers had been placed, was to fall far short of his duty. Nor did his exhortation to the passengers to throw the fighters out come up to the demands of the hour. He should have led the way, and no doubt passengers and hands would have followed his lead. He should have stopped the train, and hewed a passage through the intrusive mass until he had expelled the rioters, or have demonstrated, by an earnest experiment, that the undertaking was impossible.

Such are the impressions which this novel case has made upon our minds. We think there was error in submitting the case upon the

first two propositions, but none in submitting it on the third, and if the record showed that the jury decided it upon this latter ground the judgment could be affirmed. But, inasmuch as the error we find upon the record may have infected the verdict, the judgment must be reversed, and a *venire facias de novo* awarded.

BATTON *v.* SOUTH AND NORTH ALABAMA R. CO.

77 Ala. 591. 1884.

SOMERVILLE, J. The action is one of novel impression for which we nowhere find a precedent. It is a suit for damages against a common carrier, a railroad company, instituted by a passenger for the alleged negligence of the carrier in failing to protect the plaintiff, who was a female, and a single woman at the time of bringing the suit, against the nuisance of indecent language and conduct of certain unknown strangers, who proved disorderly in the presence of the plaintiff, while she was seated in the ladies' waiting-room of a railroad station belonging to the road line of the defendant company. No assault on the plaintiff is shown, but only vulgar and profane language, and indecent exposure of person, and disorderly conduct, on the part of two or three intruders, who are in no wise connected with the defendant, as servants or agents.

It may be admitted that the plaintiff, Mrs. Batton, who, having married since suit was brought, unites with her husband in this action, was a passenger, inasmuch as she had purchased a ticket on the road, and had entered the waiting-room at the station, not an unreasonable length of time before the passenger train was due at Calera, *en route* for the place of her destination, which is shown to be the city of Birmingham. Wabash R. R. Co. *v.* Rector, 104 Ill. 296; Gordon *v.* Grand St. R. Co., 40 Barb. 546.

The nuisance complained of appears to have been an extraordinary occurrence, and one of which no officer or agent of the defendant company is shown to have been at the time cognizant, except a colored employee, or porter, whose duties were confined to looking after the baggage of the passengers.

The question thus presented is, whether it was the duty of the defendant to keep on hand a police force at the station for the protection of passengers against the insults or disorderly violence of strangers. If not, they would be guilty of no negligence which would render them liable in damages for breach of duty. The broad proposition is urged upon us, that it is the duty of railroad companies, when acting as common carriers, to use the utmost care in protecting passengers, and especially female passengers, not only from the

violence and rudeness of its own officers and agents, but also of intruders who are strangers. We need not say that there may not be certain circumstances under which the law would impose such a duty. There are many well-considered cases which support this view, but none of them fail to impose the qualification, that the wrong or injury done the passenger by such strangers must have been of such a character, and perpetrated under such circumstances, as that it might reasonably have been anticipated, or naturally expected to occur. In Britton *v.* Atlanta & Charlotte Ry. Co., 88 N. C. 536; 18 Am. & Eng. R. Cas. 391; s. c. 43 Am. Rep. 748, the rule is stated to be, that "the carrier owes to the passenger the duty of protecting him from the violence and assaults of his fellow-passengers or intruders, and will be held responsible for his own or his servants' neglect in this particular, when, by the exercise of proper care, the acts of violence might have been foreseen and prevented, and while not required to furnish a police force sufficient to overcome all force, when unexpectedly and suddenly offered, it is his duty to provide ready help, sufficient to protect the passenger from assaults from every quarter which might reasonably be expected to occur, under the circumstances of the case and the condition of the parties." We may assume this to be the law for the purpose of this decision, as it seems to be supported by authority. New Orleans R. Co. *v.* Burke, 53 Miss. 200; Pittsburg R. Co. *v.* Hinds, 53 Penn. St. 512; Pittsburg R. Co. *v.* Pillow, 76 Penn. St. 510; Goddard *v.* Grand Trunk R. Co., 57 Me. 202; s. c. 2 Am. Rep. 39; Cooley, Torts, 644, 645; Nieto *v.* Clark, 1 Cliff. 145; Putnam *v.* Broadway R. Co., 55 N. Y. 108; s. c. 14 Am. Rep. 190.

In the case of the Pittsburg Ry. Co. *v.* Hinds, 53 Penn. St. 512, the plaintiff, who was a passenger, sued the defendant company for an injury received by her at the hands of a mob, who, defying the power of the conductor, entered the cars at a wayside station, and commenced an affray, which resulted in an injury to the plaintiff. It was held not to be the duty of the railroad companies to furnish their trains with a police force adequate to such emergencies, the court observing that "they are bound to furnish men enough for the ordinary demands of transportation, but they are not bound to anticipate or provide for such an unusual occurrence as that under consideration." "It is one of the accidental risks," said Woodward, C. J., "which all who travel must take upon themselves, and it is not reasonable that a passenger should throw it upon the transporter."

It cannot be said that this duty of carriers, to take due care for the comfort and safety of passengers, is to be confined to the management of their trains and cars; for the better view is, that it extends also in a measure to what has been termed "subsidiary arrangements." 2 Rorer, Railr. 951. They are bound to keep their stations in proper repair, and sufficiently lighted, and to provide

reasonable accommodations for the passengers who are invited and expected to travel their roads. Knight *v.* Portland R. Co., 56 Me. 234, McDonald *v.* Chicago R. Co., 26 Iowa, 124. The measure of duty is admitted by all the authorities, however, not to be so great as it is after a passenger has boarded the train, for reasons of a manifest nature. Balt. & Ohio R. Co. *v.* Schwindling, 101 Penn. St. 258; s. c. 47 Am. Rep. 706; 8 Am. & Eng. R. Cas. 552, note.

We do not think that there is any duty to police station-houses, with the view of anticipating violence to passengers, which there are no reasonable grounds to expect. This is as far as the case requires us to go. The liability of a common carrier, when receiving a passenger at a station for transportation, ought not to be greater than that of an innkeeper, who is never held liable for trespasses committed ordinarily by strangers upon the person of his guests. 2 Kent, Com. 593 *. There is nothing tending to prove that the company had notice of any facts which justified the expectation of such a wanton and unusual outrage to passengers. Their contract of safe carriage imposed upon the company no implied obligation to furnish a police force for the protection of passengers against such insults. It is shown neither to be commonly necessary nor customary. It was a risk which was incidental to one's presence anywhere when travelling without a protector, and it was the plaintiff's risk, not the defendant's.

We discovered no error in the ruling of the court, and the judgment must be affirmed.

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d. *Contributory Negligence.*

ILLINOIS CENTRAL R. CO. *v.* GREEN.

81 Ill. 19. 1875.

Sheldon, J. This was an action on the case, for personal injury to appellee whilst a passenger on the cars of appellant.

The appellee took the cars of appellant at Odin, in this State, going south, at about 9 o'clock in the evening of May 25, 1870. He was going to a place about seven miles east of Mt. Vernon, and took a ticket to Ashley, which is some five miles north of Little Muddy Bridge. The accident occurred in getting off the train at this bridge. There was no station there, but there was a water-tank, and it was a regular stopping-place for supplying water to the engines, and for no other purpose.

Appellee's account of the affair is substantially as follows: That the conductor on the train took his ticket between Odin and Centralia, that he objected to the conductor taking his ticket, because

appellee was a stranger on the road, and wanted to know when he arrived at Ashley; that the conductor said to him, "Give yourself no uneasiness; we always see that our passengers are put off at their regular stations;" that they stopped at Centralia, and remained there awhile; that Centralia is fourteen miles from Ashley; that he went to sleep, and remained so until he heard the locomotive whistle and the station called out of Irvington, which was seven and one-half miles from Ashley; that it was four miles from Irvington to Richview; that Irvington and Richview were the only stations between Centralia and Ashley; that after leaving Irvington he went to sleep again; that he heard the whistle, and no station announced, and then when the cars travelled along again he supposed they were going down grade, which he took to be a grade from Ashley to Richview, and he began to think he was reaching his station, and he inquired if they were coming to Ashley, and the response was, by passengers on the cars, that they had passed Ashley and were coming to the next station; that when the cars became about still he stood up in his seat and looked back, and asked the passengers if they saw anything of the conductor on the car, and they remarked they did not; that he felt that he had been neglected, and went to the door, and, finding it unlocked, turned around and said, "Gentlemen, this is right, I suppose," and, being answered in the affirmative, he then opened the door and went out on the platform; a light was shining on the platform, but there was no brakeman there; that he put out his foot to reach the platform, if he could, and there being no platform as he expected, it gave him a jerk and pulled both feet off the car, and left him hanging by one hand; his weight pulled him loose, and he fell and received the injury; that it was between 10 and 11 o'clock at night when he arrived at Little Muddy Bridge, and was quite dark. In falling, appellee did not strike anything till he struck the ground under the bridge, a distance of some thirty feet. He said he knew he was not at Ashley before he went out of the car.

There was further testimony that the train, at the time, between Odin and Centralia, was under the charge of Conductor Gilman. Gilman testified that he could not remember having any conversation with any passenger on that train, and says if a passenger got on at Odin with a ticket for Ashley he would punch the ticket and hand it back. The train at Centralia was handed over by Gilman to Conductor Morgan, who says that the train consisted of a sleeping-coach, a ladies' car, a gentlemen's car, a second-class and baggage car combined, and an express car. On leaving Centralia, he says, he went through the train and took up all tickets to local points as far south as Du Quoin. The train was large, and stopped at all regular stations. The stations were called. That is the brakeman's business, although he did it also. That night one brakeman was stationed between the sleeping-coach and ladies' car. He

would call the stations on both of these cars. The other brakeman was between the baggage car and the next car to it, — the gentlemen's car. Thus located, all the brakes of the four cars were under the control of the two brakemen. The train stopped at Little Muddy Creek that night to take water. The bridge is for trains to pass on. The train stands partly on the bridge while they take water. No station there, and no platform. Bridge never used except for cars. No light there that night when the train stopped. Several passengers got off at Ashley that night, among them women and children, and were attended to by the conductor. That the general custom of railroads is to notify passengers of the stations by calling out the names of the stations as they are reached.

Thomas Winters was the brakeman stationed that night between the baggage car and the gentlemen's car. He testifies that he called the station as the train arrived at Ashley on the night of the accident. He remembers it from the fact that Morgan, the conductor, the next day asked him if he had called that station, and he then remembered that he had.

A Mr. Turlay of Centralia, who was on the train, states that he saw a passenger get up and walk out of the rear door of the car at Little Muddy Bridge, and he supposed that he was going into the ladies' car on account of the annoyance occasioned to him by the conversation of a party of four persons who were sitting opposite to him, Mr. Turlay being one of the number; that the man never asked any question of any one, so far as he heard.

We are of opinion the evidence in this case discloses no cause of action.

It is said there was negligence in carrying the appellee past his station.

Conceding all that is claimed in that respect, appellee would not, for such cause, be justified in jumping off the train, or otherwise needlessly exposing himself to injury, and then claim the liability of appellant for the injury he might receive in consequence. The injury here received had no proper connection with being carried past a destined station, and for such act appellant cannot be held responsible for any such remote and unnatural consequence thereof as the injury here sued for.

It is then insisted that the stoppage of a passenger car at such a place as the one in question, without some precaution to notify passengers of danger, was an act of gross negligence.

But why notify passengers of danger? It was a stopping-place for getting water, not for passengers. The bridge was intended solely for the passage of cars, not for the alighting of passengers upon it. The place for the passenger here was inside, not outside of the car. The train and the appellee in his proper place inside the car were as safe upon the bridge as they would have been anywhere away from it. The fact that the cars were upon the bridge

involved no danger or risk to the passenger, so long as he remained in his right place, within the car.

There was a right to presume that the passenger would keep in his place inside the car. It was not to be anticipated that he would be getting off the car where he had no business to do so, and that there was any necessity for providing against it.

It cannot be said that there was any invitation to appellee to alight where he did. The mere stopping of the train is not to be so regarded.

It may be inferred, from appellee's testimony, that he heard the whistle at the bridge. If so, it was not a signal of approach to a station. The testimony of the conductor on that head was: "They [brakemen] know where the tank is, and the engineer does not whistle in coming to it, with the exception that, once in a while, when the engineer sees the train is going by the tank, he will then give a little toot — whistle down brakes; don't know whether he whistled that night or not. There is a fixed whistle for down brakes, one short whistle, and is used on all portions of the line. They use the same whistle when they want to stop, except at regular stations they whistle a long whistle, and don't whistle any stop whistle at all. This short toot is used to apply the brakes between stations, where there is danger, when you want the train to stop at an irregular place where there is danger, or anything on the track, but in stopping regularly we don't use that at all."

Appellee testified that he was accustomed to travel on railways. He was not justified in taking the whistle as notice of approaching a station. Any encouragement to get off, which, according to his testimony, he might have received from any passenger of course is not to be imputed to the company as in any way its act. Appellee getting off the car where he did was an entirely uncalled for and voluntary act of his own, uninvited and unencouraged by any one in the management of the train, and he took the risk of the consequence. The act of thus getting off in the darkness of night, at an unknown and dangerous place, was one of gross carelessness, whereby appellee exposed himself to the injury which he received. The harm which one brings upon himself he is to be considered as not having received. So far as his relations to others are concerned, such harm is uncaused. Chicago & Alton Railroad Company *v.* Becker, 76 Ill. 31.

Had appellee used ordinary prudence, the casualty would not have happened. Having failed in this, the company ought not to be liable. Chicago & Northwestern Railway Co. *v.* Sweeney, 52 Ill. 331. And see Chicago & Alton Railroad Co. *v.* Gretzner, 46 id. 75; Chicago, Burlington & Quincy Railroad Co. *v.* Van Patten, 64 id. 511; Chicago Rock Island & Pacific Railroad Co. *v.* Bell, 70 id. 103; Todd *v.* Old Colony, etc., Railroad Co., 3 Allen, 18; Louisville and Nashville Railroad Co. *v.* Sickings, 5 Bush, 1; Pittsburg

A Connellsville Railroad Co. *v.* Andrews, 39 Md. 329; 2 Redf. Am. Railway Cases, 552, in note to McClurg's case; The Indianapolis, etc., Railroad Co. *v.* Rutherford, 29 Ind. 82.

It is a requisite to the liability of a railway company, as a passenger carrier, that the passenger should not have been guilty of any want of ordinary care and prudence which directly contributed to the injury. 2 Redfield on Railways, 224, 236.

The judgment must be reversed, there being no cause of action under the evidence.

MORRISON *v.* ERIE R. CO.

56 N. Y. 302. 1874.

Appeal from judgment of the General Term of the Supreme Court in the fourth judicial department, in favor of plaintiff, entered upon an order denying motion for a new trial and directing judgment on a verdict.

This action was brought to recover damages for injuries sustained by plaintiff while leaving a car on defendant's road at Niagara Falls.

Plaintiff was twelve years of age, and was in the company and care of her parents. They were passengers on defendant's car from Buffalo to Niagara Falls. Before the train reached the latter station, the conductor called out the name of the station. The car stopped, plaintiff and her parents arose from their seats, gathered up their packages and stepped out into the passage-way between the seats, but before they had passed out of the car the train started and moved slowly by the station. The party knew the train was in motion while yet inside the car; they passed out upon the platform of the car. The train had passed beyond the stationary platform of the depot. It was evening and was dark. Mr. Morrison took plaintiff under his right arm, and, taking hold of the iron rod at the rear end of the platform with his left hand, stepped from the car, he fell, and plaintiff's foot was crushed by the car wheels. Further facts appear in the opinion.

At the close of plaintiff's evidence and also of the entire evidence defendant's counsel moved for a nonsuit, which was denied, and defendant excepted.

The court instructed the jury among other things, that the plaintiff had a *right* to leave if the cars were under motion, and he knew it, if he exercised ordinary care under the circumstances in doing so. The defendant's counsel excepted to this instruction.

The defendant's counsel requested the court to instruct the jury, that if they, from the evidence, found the father had the care,

custody, and control of the plaintiff, as his child, and the cars were under motion, and he knew it when he took her under his arm to go out of the car, and when the cars were thus under motion, his duty was not to undertake to get off. The court declined except as qualified, that the father was bound to use ordinary care in removing her from the train. Defendant's counsel excepted.

Defendant's counsel further requested the court to charge, that if the jury found that the father, under the circumstances stated in the last request, undertook to get off from the cars while they were to his knowledge under motion, and his so doing contributed to the injury, plaintiff cannot recover. The court declined so to charge, and plaintiff excepted.

The jury found a verdict for plaintiff. Exceptions were ordered to be heard at first instance at General Term.

Folger, J. The plaintiff was a paying passenger upon the cars of the defendant, and it owed her the duty of taking her up, carrying her, and setting her down safely, so far as it was concerned therein.

There was testimony in the case, at every stage of the trial, upon which the jury had a right to rely; and relying upon which they had a right to find, that the train on which she was, did not stop at the station, at which she was to be set down, long enough for her to alight with ease and safety. Hence, the plaintiff made out so much of her case as consisted in showing that the defendant was negligent in its duty toward her.

There are undisputed facts in the case, however, which raise other important questions.

As the train approached the station at which she was to be set down, the conductor called out the name of it and then the train stopped. This was a notice and an invitation for her to get out. It was further noticed that it was time to alight, and that time enough would be given therefor. The plaintiff and her parents, in whose care she was, prepared to do so, gathered their packages, and were on their feet in the passage-way between the seats. Up to this time it cannot be said that either party was lacking in due care. Before they got outside of the car, however, the train started sharply, and moved slowly by the station. In this, as before said, was the negligence of the defendant. The plaintiff, her father and her mother, while they were yet inside the car, knew that the train was moving; as she was of tender years and immediately under their care and control, their acts and conduct were her acts and conduct, and she is to be judged thereby. The train still moving, they passed out of the car on to its platform. It was evening and was dark. The train had passed away from the stationary platform, built at the side of the track, and on a level, or nearly so, with the platform of the car. To reach the earth from the latter, a person must go down from off the steps thereof, still lower, on to the

ground. He must for a space of time be in the air, without support either by hand or foot; he must, in fact, fall or drop from the moving train to the ground, with the momentum downward of his weight, and the momentum forward, got from the motion of the car, these two not in accord. This the father of the plaintiff undertook to do; not only with his own weight making the descent alone, but holding the body of the plaintiff under one of his arms, having but the other to sustain and guide himself, thus laden; holding fast with his other hand to the railing of the car. He did this aware that there was danger in it. It was because he knew that it was dangerous that he would not let the plaintiff undertake it alone, by reason of the train being in motion. He was not directed nor advised to attempt thus to alight; on the contrary, he was told not to; though he had then got so far in it as to have lost his balance, to be unable to recover himself and retake his steps. He fell, still holding the plaintiff, and she was injured. Upon this state of facts, the defendant, by motion for nonsuit, and by exceptions to the charge given and to the refusals to charge, presents the question whether the plaintiff is chargeable with negligence contributory to the accident. The learned counsel for the defendant claims that the facts are such, as that as a matter of law, contributory negligence is shown, and that there was not a question of fact for the jury. He insisted that as a matter of law, it is always negligence and want of ordinary care for a person to attempt to get from off a car when it is in motion. Were I disposed to accede to this proposition upon principle, which I am not, I should feel myself precluded by prior decisions of this court, and influenced to a contrary conclusion by those of other courts. Filer *v.* N. Y. C. R. R., 49 N. Y. 47 [**629**], and cases cited; Penn. R. R. Co. *v.* Kilgore, 32 Penn. St. 292. The rule established, and as I think the true one is, that all the circumstances of each case must be considered, in determining whether in that case, there was contributory negligence or want of ordinary care, and that it is not sound to select one prominent and important fact, which may occur in many cases, and to say, that being present, there must, as matter of law, have been contributory negligence. The circumstances vary infinitely, and always affect and more or less control each other. Each must be duly weighed, and relatively considered, before the weight to be given to it is known. This is not to say, however, that in every case it is a question for the jury of fact, or of fact and of law to be given to the jury with instructions. Where the facts are undisputed, the question of contributory negligence may become one of law, as the other questions which arise upon a trial, and are submitted to the decisions of the court on a motion for a nonsuit or otherwise. In this case there are certain facts as to which there is and can be no dispute; and they are of such character and weight that it is for the court to say whether there is room for doubt or query, but that there was a complete

absence of that care and prudence, without which, in the direction of conduct, there is negligence. I am aware that it has been held more than once in this court, and more than once in other courts, that though an injury has been received by a passenger in alighting or passing from a car while it is in motion, yet it was a question for the jury to answer, whether there was a lack of ordinary care under all of the circumstances. McIntyre *v.* N. Y. C. R. R., 37 N. Y. 287; 49 id. *supra*, and cases cited. In those cases, the passenger was not left alone, to his own judgment and discretion. A direction or notification of some employee of the defendant, having authority or place upon the train, came in to influence the mind of the passenger, to remove apprehension of danger, to induce a sense of safety in action, and a failure to exercise the prudence which the occasion demanded; and it was as if the defendant had assumed the control and responsibility of the act; and so, there being no responsible volition by the passenger, there was no damnifying negligence. And there it was under the pressure of these affecting and controlling circumstances in the case, that the question was left to the jury to determine whether there was a failure to exert ordinary care and prudence. So in Foy *v.* L. B. & So. C. R. Co., 18 Com. Ben. [N.S.], 225, the porter of the defendant directed the alighting of the passenger where there was no platform. And that stress is to be laid upon this circumstance is shown by the judgment in Siner *v.* G. W. R. Co., L. R. [3 Exch.], 150; affirmed [Exch. Ch.], 4 id. 117. Though in Penn. R. R. Co. *v.* Kilgore, 32 Penn. St. 232, there was no such fact, yet there were facts which made the case quite unlike that here, and so characterized it as to render it appropriate to commit it to a jury. There, the passenger was a woman in feeble health, in a strange place, with her three young children in her charge. At dusk the train had stopped at the station to which she had taken passage. She and her children had left their seats and passed out while the train was at a stand-still; two of the young folks had passed off; she was on the steps of the car with the other; by the starting of the cars, that one was thrown prone upon the station platform; at the instant she leaped upon that platform and was hurt. It was a matter of impulse, not of thought, discretion, and prudence, and plainly quite different from that in the case at hand. It is significant, too, that in the charge in that case exceptions to which brought up the case for review, the court said: "If the plaintiff had been in the car, or on the platform, when the train had started or was in motion, and was in a situation to choose between getting off or remaining on, and with a full consciousness of her danger, with foolish rashness, persisted in leaving the car in defiance of warning to the contrary, we would be compelled to tell you, as matter of law, that she could not recover." It is plain that there was quite a different state of facts in this case from that in Kilgore's case and other cases above cited. Here, the plaintiff, or

which is the same thing, her father, was not influenced by the command or direction of an employee of superior experience and practical judgment; he was not obliged to choose one of two courses, one of which might endanger himself or the plaintiff, and the other might expose others in his charge to want of care and protection; nor was he obliged to choose suddenly; he had time for thought, within the car and on the way out to the steps of it; he knew that the train was in motion before he left the inside of the car, or essayed to get down; he not only knew that, but was then in full consciousness of the fact that there was danger in the attempt, for he would not suffer the child to undertake it by herself; and on the other hand, that there was at the most no danger, but only inconvenience in remaining on the train; knowing that there was danger in the attempt by one person, he doubled it or added to it, by loading himself with the weight of his child, and in such wise as to deprive himself of the use, in the attempt, of one arm and one hand; he did not make the attempt when he had a structure to step out upon, level with that which he must leave, but, when obliged, as he knew, to let himself fall to the ground, through some space, without support from anything during the lapse, and with no guidance save the momentum of the drop and of that got from the forward motion of the car, — forces acting at variance from each other, and neither tending to steadiness and uprightness of position. All of this was no result of impulse, or choice suddenly compelled. There was time for prudent choice, and correct apprehension of all the circumstances.

Now, it is certain that but for the attempt of the plaintiff's father then to get down from out the car she would not have been injured as she was. His act, which was her act, in thus attempting, did contribute to the accident. Was it a faulty act in him? If it was, then it was such contributory negligence as relieves the defendant from liability to her, for their negligence toward her. It was faulty in him, if it was such an act as would not have been done by one exercising the care for his person, which men of ordinary care and prudence for their safety and well-being are accustomed to employ under the same or like circumstances. Can it be said that a person of ordinary prudence and care would have swung himself from a car in motion down to the ground in the dark, laden with the weight of a child twelve years old, having but one hand and one arm to aid himself with, when there was no other danger to be avoided by meeting this, and no incentive to the act, other than the inconvenience of being carried by his place of abode, and with a full apprehension of the danger he was about to run? I think not. And I am of the opinion that it is so clear that the law and the court should have given the answer without calling in the aid of a jury. Lucas *v.* N. B. & T. R. R. Co., 6 Gray, 64, is, in principle, in support of the foregoing; as is also Phillips *v.*

Rens. & Sar. R. R. Co., 49 N. Y. 177. And see also Nichols *v.* Sixth Av. R. R. Co., 38 N. Y. 131.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur except CHURCH, Ch. J., and ANDREWS, J., dissenting.

FILER *v.* NEW YORK CENTRAL R. CO.

59 N. Y. 351. 1874.

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover damages for injuries received by plaintiff, while getting off a train on defendant's road, alleged to have been occasioned by defendant's negligence.

Plaintiff took passage at Rochester for Fort Plain, where she arrived about 3 A. M. The brakeman called out the name of the station; the cars moved slowly, but did not stop. Plaintiff went out on the platform, and, while waiting, some one told her that she had better get off, as the train was not going to halt any more. As to who this person was, the evidence was conflicting, plaintiff's evidence tending to show it was a brakeman, defendant's, that it was not a person employed on the train but a passenger. Plaintiff attempted to alight, her clothing caught on the step, and she was thrown down and injured. In regard to the advice or direction given to her, the court charged that he did not see that it would make any difference whether it was a brakeman or any other person, but the question was: "Was it prudent for her, acting under the advice thus given to her by anybody, to alight from that train?" To which defendant's counsel duly excepted.

GROVER, J. This case has been before this court upon a previous occasion, when the questions presented were nearly all determined. 49 N. Y. 47; see, also, William Filer *v.* N. Y. C. R. R. Co., id. 42. Some of the questions were, upon the present trial, presented in an aspect somewhat different, but not so varying the legal principle, applicable thereto, as to require further discussion. Upon the last trial, an additional question was presented. The evidence showed that the injury sustained by the plaintiff was caused by her getting off the cars while in motion, and it was insisted, by the counsel for the defendant, that this was contributory negligence, on her part, such as to preclude her recovery. To meet this objection, the plaintiff gave evidence tending to show that she was told by the brakeman to get off where and when she did, but the evi-

dence was conflicting as to whether this direction to her was given by the brakeman or some other person having no connection with the management of the train or anything to do with it except as passengers. Upon this point the judge charged the jury, in substance, that it was immaterial, and did not make any difference whether such direction was given by the brakeman or any other person: that it was for them to determine whether she was guilty of negligence in getting off after having received such direction from any one. I think this was error. The employees upon a train, including brakemen, are in the line of their duty in assisting passengers in getting on and off the train, and in directing them in procuring seats. Passengers rightly assume that these persons are familiar with all the movements of the train, and know whether they can, under the particular circumstances, get on or off, or move upon the train with safety. When the conductor or brakeman directs a passenger to get off the train, although in motion, such passenger will naturally assume that he knows it is entirely safe, or he would not give the direction. See cases cited in opinions in above cases. Not so in case the direction is given by one having no connection with the train, other than a passenger. As to such a person, there is no reason to suppose that he knows anything more about whether it is safe to follow his direction than the one to whom it is given.

For the above error in the charge, the judgment must be reversed, and a new trial ordered, costs to abide event.

BUEL *v.* NEW YORK CENTRAL R. CO.

31 N. Y. 314. 1865.

APPEAL from judgment of the Supreme Court. The action was to recover damages for injuries received by the plaintiff, while a passenger on the defendant's railroad, in October, 1857, by a collision of trains on the route between Rochester and Batavia.

The cause was tried at the Genesee Circuit, in November, 1858, before Mr. Justice DAVIS and a jury. It appeared from the evidence that on the evening of the 9th of October, 1857, the plaintiff was a passenger on a train of cars of the defendant's passing west from Rochester through Bergen, between Rochester and Batavia. He occupied a seat in the second passenger car, near the centre, and upon the south side. Upon reaching Bergen the train was run on a switch, where it remained fifteen minutes waiting for a train due there from the west. It then started west, and had proceeded but a short distance when the train from the west was discovered coming

at the speed of about twenty-five miles an hour. The engine attached to the train on which the plaintiff was, was reversed, but not in time to enable it to be backed wholly down on the switch, and avoid a collision. The collision occurred driving the cars of one of the trains from forty to sixty rods over the ties, killing at least one man on the down train, jamming up the train going west, and breaking off some of the platforms of its cars.

The plaintiff had remained in his seat all the time the train was at Bergen. He sat facing the engine, by a window that was open. When his train stopped, and commenced backing down, he looked out of the window and saw the approaching train, and men jumping from the cars. He left his seat, and hurried to the forward door of the car as fast as he could to escape. As he opened the door, and set his right foot on the platform, the collision occurred. He was thrown forward and partially stunned; he tried to get up, but could not use his right leg; it was broken in four places below the knee, and his ankle and knee were bruised. . . . . .

The car in which the plaintiff was seated at the time of the accident was about two-thirds full of passengers. There seems not to have been an unusual commotion in this car at the time of the collision, and those who remained in their seats were uninjured.

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Wright, J. It is not now claimed, as it was on the motion for a nonsuit, that the evidence failed to show negligence on the part of the defendants. Indeed, a grosser case of careless conduct is seldom presented to a court and jury. The train in which the plaintiff was a passenger had been run on the switch at Bergen, to await a train from the west which was due there. After waiting some fifteen minutes the train was irregularly started, the conductor getting on the engine. It was a dark and foggy night. The train had proceeded some forty rods when the western train was seen approaching at a rate of speed of about twenty-five miles to the hour. An effort was made, by breaking up and reversing the engine, to get the up train back on the switch, but before this could be effected a collision of the trains occurred. The case then was, that, on a dark and foggy night, trains of the defendants running in opposite directions, out of time, and one of them, at least, at an unusual rate of speed, near a station, run into each other, occasioning destruction of property and perilling the lives of the passengers. No casualty can occur on a railroad which manifests grosser carelessness than a collision of trains which are running towards each other, out of time, and at a rate of speed which prevents their being stopped in season. And that was just this case.

But it is insisted that, although the defendants' negligence caused the injury complained of, the plaintiff should have been nonsuited, because his careless conduct contributed to produce it. The misconduct alluded to is, that, upon seeing the approaching train and

men jumping from other cars to avoid the impending danger, he left his seat and rushed to the forward door of the car with the view of escaping himself, and had stepped one foot upon the platform at the instant of the collision. This, it is said, was such negligence as to have required the court to nonsuit the plaintiff. That is, as a matter of law, a passenger in a railroad car, who sees that he is placed in peril by the culpable conduct of the managers of the road, and judges correctly that a collision is inevitable, is guilty of a wrong if he does not control the instinct of self-preservation, and sit still, and take the chances of safety. This is not the law. Seeing the danger in which he was placed, the plaintiff was justifiable in seeking to escape injury by leaving the car. His act was not the result of a rash apprehension of danger that did not exist. By the merest chance, the passengers in the same car with him, and who did not, like him, see the approaching collision, and who retained their seats, escaped uninjured. Although doubtless much excited, I do not think even that there was an error of judgment as to the course pursued to secure safety. A moment of time earlier would have enabled him to leap from the car, thus affording a probable chance of escape. But if he misjudged in this respect, the circumstances did not, as matter of law, charge him with negligence, or want of ordinary prudence. Seeing the approaching train, and that a collision, with its consequences, was inevitable, it was not the dictate of prudence to have deliberately kept his seat without an effort at self-preservation. There is no man, under the circumstances, retaining his senses and acting with ordinary prudence, that would not have exerted himself in some way to escape the great peril. It was not to invite, but to escape injury that he left his seat, and rushed to the door of the car; and an instant of time more would have enabled him to effect his purpose. That other passengers, who neither saw or had notice of the impending danger, remained in their seats, and, by chance, were uninjured, is no evidence that they judged rationally, or judged at all, as to what prudence required, or that the plaintiff misjudged, and acted rashly. At all events, it was for the jury, and not the court, to say whether the plaintiff's conduct, in view of the circumstances, was rash or imprudent, or amounted to negligence.

The court was requested to charge the jury, that as the plaintiff was injured on the platform of the car, in violation of the printed regulations of the company, he was not entitled to recover. This was properly refused. The statute exempts a railroad company from liability to a passenger who shall be injured while on the platform of a car, &c., in violation of the printed regulations of the company posted up at the time in a conspicuous place inside of its passenger cars [illegible] in the train; provided the company at the time furnished room inside its passenger cars sufficient for the proper accommodation of the passengers. Laws of 1850, ch. 140, § 16.

There was, in this case, a printed regulation, pursuant to this statute, posted in a conspicuous place inside the car, prohibiting passengers from standing or riding on the platform of any car. But neither the statute nor the regulation has any application to a case like the present one. The plaintiff was not standing or riding on the platform at the time of the collision, but was hurrying as fast as he could to leave the car, in order to escape an imminent peril. The statute was intended to prevent the imprudent act of standing or riding on the platform, but not to absolve railroad companies from responsibility for every injury which might happen at that place, when a passenger is passing over it, while justifiably entering or leaving the cars.

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I am of the opinion that the judgment of the Supreme Court should be affirmed.

WAITE *v.* NORTHEASTERN R. CO.

Queen's Bench. E. B. & E. 719. 1858.

Action by Alexander Waite, the younger, an infant, by Alexander Waite, his next friend.

On the trial, before Martin, B., at the last Spring Assizes for Northumberland, it appeared that defendants had the management of a railway from Tweedmouth to Kelso; and that, on 1st January, 1857, plaintiff, an infant of the age of five years or thereabouts, accompanied Mrs. Park, his grandmother, to the Velvet Hall Station, one of the stations on the Tweedmouth and Kelso Railway, for the purpose of proceeding together to Berwick-upon-Tweed by the 10.51 A.M. train. The plaintiff and Mrs. Park arrived at the Velvet Hall Station at 10.30. Mrs. Park bought of the station-master a ticket for herself and a half-ticket for plaintiff, which entitled them to be carried to the Tweedmouth Station near Berwick by the 10.51 train. The platform for the departure of passengers going from Velvet Hall Station to Tweedmouth was on the side of the railroad opposite to the ticket-office; and it was necessary for such passengers to cross the railway on a level to get to that platform. The station-master, in giving out the tickets, informed Mrs. Park that the train by which she and plaintiff were to go to Tweedmouth would not be there for a quarter of an hour: the station-master saw Mrs. Park and plaintiff go, after having got their tickets, and sit down by the fire. The station-master, who was the only person in charge of the station, after giving out the said tickets, immediately left the ticket-office and went to the end of the station-yard to superintend the unloading of some goods, and

returned in seven or eight minutes, which was not until after the injuries which are the cause of the present action had been sustained. While so engaged, the station-master was unable, owing to the position in which he was, to see the ticket-office or the platform. Neither could he see along the line towards Tweedmouth; but could see along the line towards Kelso. Any train, as it approached the Velvet Hall Station from Kelso, could be seen by any one on the platform for a considerable distance: the station-master generally went into the room and told the passengers to cross when the train was in sight; and had done so to Mrs. Park when she was there, she having been frequently in the habit of going by that train to Tweedmouth. The station-master did not warn plaintiff or Mrs. Park against crossing the line, or inform them that another train was expected to pass the station before the arrival of their train. Nor were any means adopted, by locking the door of the ticket-office, or otherwise, to prevent the plaintiff or Mrs. Park crossing the line at any time; nor was there any clock at the station. Before the passenger train for which the plaintiff and Mrs. Park had taken tickets arrived at the station, a goods train coming from Kelso, with a tender before the engine, passed the Velvet Hall Station, going towards Tweedmouth: Mrs. Park and the plaintiff were struck by it as they were crossing the line to go to the platform already mentioned. Mrs. Park was killed: and plaintiff was severely injured; and for that injury the present action was brought. The goods train was not a train which stopped at the station, and passed the station at its usual pace of about twenty miles an hour. No one saw Mrs. Park or plaintiff in the act of crossing the railway; and neither the station-master nor any one on the goods train knew that the injuries had been sustained until after the goods train had passed the station.

The jury, in answer to questions put to them by the learned judge, found that defendants were guilty of negligence, and that Mrs. Park was also guilty of negligence which contributed to the accident, and they assessed the damages at £20. There was no negligence, nor was any suggested on the part of the infant plaintiff. The learned judge directed a verdict for the plaintiff for £20, with leave to the defendants to move to enter a verdict for them or for a nonsuit.

Lord Campbell, C. J. In this case we think that the rule ought to be made absolute for entering a verdict for the defendants, or for a nonsuit. The jury must be taken to have found that Mrs. Park, the grandmother of the infant plaintiff, in whose care he was when the accident happened, was guilty of negligence without which the accident would not have happened; and that, notwithstanding the negligence of the defendants, if she had acted upon this occasion with ordinary caution and prudence, neither she herself nor the infant would have suffered. Under such circumstances, had she

survived, she could not have maintained any action against the company; and we think that the infant is so identified with her that the action in his name cannot be maintained. The relation of master and servant certainly did not subsist between the grandchild and the grandmother; and she cannot, in any sense, be considered his agent: but we think that the defendants, in furnishing the ticket to the one and the half ticket for the other, did not incur a greater liability towards the grandchild than towards the grandmother, and that she, the contracting party, must be implied to have promised that ordinary care should be taken of the grandchild.

We do not consider it necessary to offer any opinion as to the recent cases in which passengers by coaches or by ships have brought actions for damage suffered from the negligent management of other coaches and ships, there having been negligence in the management of the coaches and ships by which they were travelling, as, at all events, a complete identification seems to us to be constituted between the plaintiff and the party whose negligence contributed to the damage which is the alleged cause of action, in the same manner as if the plaintiff had been a baby only a few days old, to be carried in a nurse's arms.

Rule absolute.

IN THE EXCHEQUER CHAMBER.

THE plaintiff having appealed against the above decision, the case was now argued.

COCKBURN, C. J. I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed. I put the case on this ground: that, when a child of such tender and imbecile age is brought to a railway station or to any conveyance, for the purpose of being conveyed, and is wholly unable to take care of itself, the contract of conveyance is on the implied condition that the child is to be conveyed subject to due and proper care on the part of the person having it in charge. Such care not being used, where the child has no natural capacity to judge of the surrounding circumstances, a child might get into serious danger from a state of things which would produce no disastrous consequences to an adult capable of taking care of himself. Here the child was under the charge of his grandmother; and the company must be taken to have received the child as under her control and subject to her management. The plea and the finding show that the negligence of the defendants contributed partially to the damage; but that the negligence of the person in whose charge the child was, and with reference to whom the contract of conveyance was made, also contributed partially. There is not therefore that negligence on the part of the defendants which is necessary to support the action.

POLLOCK, C. B. I entirely agree. The shortest way of putting Mr. *Mellish's* argument is that this is not a mere case of simple

wrong, but one arising from the contract of the grandmother on the part of the plaintiff, who must avail himself of that contract, without which he cannot recover. There really is no difference between the case of a person of tender years under the care of another and a valuable chattel committed to the care of an individual, or even not committed to such care. The action cannot be maintained, unless it can be maintained by the person having the apparent possession, even though the child or the chattel was not regularly put into the possession of the person, as, for instance, though the party taking charge of the child had done so without the father's consent; that circumstance would make no difference as to the question of the child's right. That is my reason for pressing this argument of Mr. *Mellish*, as it meets every possible view of the case.

Williams, J. I am entirely of the same opinion. The view of the jury was that the accident would not have occurred but for the negligence of the grandmother. There was here, as it seems to me, from the particular circumstances of the case, an identification of the plaintiff with the grandmother, whose negligence is therefore an answer to the action. At the same time, I do not mean to express any doubt that, generally, where a child is of such tender years as here, and is carried about by any person having it in charge, the rule as to joint negligence of plaintiff and defendant applies. The person who has the charge of the child is identified with the child. If a father drives a carriage, in which his infant child is, in such a way that he incurs an accident, which by the exercise of reasonable care he might have avoided, it would be strange to say that, though he himself could not maintain an action, the child could. So, if the child be in the arms of a person who does not choose to get out of the way of a train. But it is unnecessary to insist on this general ground: because, on the mere narrow view of the plaintiff's right in this case, the defence must prevail.

Crowder, J. I am of the same opinion, on the grounds given in the judgment delivered in the Court of Queen's Bench. The case is the same as if the child had been in the mother's arms. There is an identification such that the negligence of the grandmother deprives the child of the right of action. Now the finding of the jury would clearly have prevented the grandmother from recovering: it therefore has the same effect in respect of an action by the child. It would be monstrous and absurd if there could be a distinction.

Blackburn, B. I am of the same opinion. In form the action is for a wrong; but it is in fact for a breach of duty created by contract. It is alleged that the plaintiff was lawfully on the railway. That could be so only on the supposition that he had become a passenger through the instrumentality of himself or another. There must be a contract or duty. It is impossible here to say that the [illegible] contracted any other duty towards the infant, thus accompanied, than they would have contracted towards an adult, or that

they were responsible for what would have occasioned no mischief but for the negligence of a person having the custody of the plaintiff. That would be an absurdity: and we should have to hold that, where a chattel is injured partly through the negligence of the party having charge of it, such person could maintain no action, but that the owner, if a different person, could. The case appears even more distinct upon the pleadings. The first count charges that the plaintiff was lawfully upon and crossing the railway; the second plea denies this, and states that the plaintiff was under the direction and control of a person who, with the plaintiff, was wrongfully on the railway; and the verdict shows this plea to be true. The second count states also that the plaintiff was lawfully on the railway; and it is similarly answered.

Watson, B. I am of the same opinion. The plaintiff is a child of an age at which he is incapable of exercising proper care for himself. The charge against the company is that they did not give proper warning to the grandmother; and all the duties which arose towards the child were with reference to it as being under the charge of the grandmother; and, as my brother Williams says, the case is the same as if the plaintiff had been a child in arms. Many other cases have been put and discussed by Mr. *Manisty;* but these we need not now examine.

Judgment affirmed.[1]

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5. LIABILITY FOR DELAY.

SEARS *v.* EASTERN R. CO.

14 Allen (Mass.), 433. 1867.

Action containing one count in contract and one in tort. Each count alleged that the defendants were common carriers of passengers between Boston and Lynn, and that on the 15th of September, 1865, the plaintiff was a resident of Nahant, near Lynn, and the defendants before then publicly undertook and contracted with the public to run a train for the carriage of passengers from Boston to Lynn at nine and one half o'clock in the evening each week-day, Wednesdays and Saturdays excepted; and the plaintiff, relying on said contract and undertaking, purchased of the defendants a ticket entitling him to carriage upon their cars between Boston and Lynn, and paid therefor twenty-five cents or thereabouts, and on a certain

[1] The passenger is not so far identified with the carrier that negligence of the carrier will be imputed to him in an action against a third person for an accident due to the negligence of such third person causing him injury. See Little *v.* Hackett, 116 U. S. 366. (1886.)

week-day thereafter, neither Wednesday nor Saturday, namely, on the 15th of said September, presented himself on or before the hour of nine and a half o'clock in the evening at the defendants' station in Boston and offered and attempted to take the train undertaken to be run at that hour, as a passenger, but the defendants negligently and wilfully omitted to run the said train at that hour, or any train for Lynn till several hours thereafter; wherefore the plaintiff was compelled to hire a livery carriage and to ride therein to Lynn by night, and was much disturbed and inconvenienced.

The following facts were agreed in the Superior Court: The defendants were common carriers, as alleged, and inserted in the "Boston Daily Advertiser," "Post," and "Courier," from the 15th day of August till the 15th day of September an advertisement announcing the hours at which trains would leave Boston for various places, and among others that a train would leave for Lynn at 9.30 P. M. except Wednesdays, when it would leave at 11.15, and Saturdays, when it would leave at 10.30.

The plaintiff, a resident of Nahant, consulted one of the above papers, about the 9th of September, 1865, for the purpose of ascertaining the time when the latest night train would start from Boston for Lynn on the 15th, in order to take the train on that day, and saw the advertisement referred to. On the 15th, which was on Friday, he came to Boston from Lynn in a forenoon train, and in the evening, shortly after nine o'clock, presented himself at the defendants' station in Boston for the purpose of taking the 9.30 train for Lynn, having with him a ticket which, previously to September 9th, he had purchased in a package of five. This ticket specified no particular train, but purported to be good for one passage in the cars between Boston and Lynn during the year 1865. He learned that this train had been postponed to 11.15, on account of an exhibition, and thereupon hired a buggy and drove to Lynn, arriving there soon after 10.30. He had seen no notice of any postponement of this train. He once, in 1864, observed a notice of postponement, and heard that the defendants sometimes postponed their late trains.

For several years before 1865, the defendants' superintendent had been accustomed occasionally to postpone this train, as often as from once to three times a month, for the purpose of allowing the public to attend places of amusement and instruction, and also upon holidays and other public occasions in Boston; giving notice thereof by handbills posted in the defendants' cars and stations. On the 13th of September, 1865, in pursuance of this custom, he decided to postpone this train for September 15th till 11.15, and on the same day caused notice thereof to be printed and posted in the usual manner. The train was so postponed, and left Boston at 11.15, arriving at Lynn at 11.45.

The defendants offered to prove, if competent, that this usage of

detaining the train was generally known to the people using the Eastern Railroad, and that the number of persons generally going by the postponed train was larger than generally went by the 9.30 train, and was larger on the evening in question; but at the station in Boston there were persons complaining of the postponement of the train, and leaving the station.

It was agreed that, if on these facts the plaintiff was entitled to recover, judgment should be entered in his favor for ten dollars, without costs. Judgment was rendered for the defendants, and the plaintiff appealed to this court.

Chapman, J. If this action can be maintained, it must be for the breach of the contract which the defendants made with the plaintiff. He had purchased a package of tickets entitling him to a passage in their cars for each ticket from Boston to Lynn. This constituted a contract between parties. Cheney *v.* Boston & Fall River Railroad, 11 Met. 121; Boston & Lowell Railroad *v.* Proctor, 1 Allen, 267; Najac *v.* Boston & Lowell Railroad, 7 Allen, 329. The principal question in this case is, what are the terms of the contract? The ticket does not express all of them. A public advertisement of the times when their trains run enters into the contract, and forms a part of it. Denton *v.* Great Northern Railway, 5 El. & Bl. 860. It is an offer which, when once publicly made, becomes binding, if accepted before it is retracted. Boston & Maine Railroad *v.* Bartlett, 3 Cush. 227. Advertisements offering rewards are illustrations of this method of making contracts. But it would be unreasonable to hold that advertisements as to the time of running trains, when once made, are irrevocable. Railroad corporations find it necessary to vary the time of running their trains, and they have a right, under reasonable limitations, to make this variation, even as against those who have purchased tickets. This reserved right enters into the contract, and forms a part of it. The defendants had such a right in this case.

But if the time is varied, and the train fails to go at the appointed time, for the mere convenience of the company or a portion of their expected passengers, a person who presents himself at the advertised hour, and demands a passage, is not bound by the change unless he has had reasonable notice of it. The defendants acted upon this view of their duty, and gave certain notices. Their trains had been advertised to go from Boston to Lynn at 9.30 p. m., and the plaintiff presented himself, with his ticket, at the station to take the train; but was there informed that it was postponed to 11.15. The postponement had been made for the accommodation of passengers who desired to remain in Boston to attend places of amusement. Certain notices of the change had been given; but none of them had reached the plaintiff. They were printed handbills posted up in the cars and stations on the day of the change, and also a day or two before. Though he rode in one of the morning cars from Lynn to Boston, he

did not see the notice, and no legal presumption of notice to him arises from the fact of its being posted up. Brown *v.* Eastern Railroad, 11 Cush. 101; Malone *v.* Boston & Worcester Railroad, 12 Gray, 388. The defendants published daily advertisements of their regular trains in the "Boston Daily Advertiser," "Post," and "Courier," and the plaintiff had obtained his information as to the time of running from one of these papers. If they had published a notice of the change in these papers, we think he would have been bound by it. For as they had a right to make changes, he would be bound to take reasonable pains to inform himself whether or not a change was made. So if in their advertisement they had reserved the right to make occasional changes in the time of running a particular train, he would have been bound by the reservation. It would have bound all passengers who obtained their knowledge of the time-tables from either of these sources. But it would be contrary to the elementary law of contracts to hold that persons who relied upon the advertisements in either of those papers should be bound by a reservation of the offer, which was, without their knowledge, posted up in the cars and stations. If the defendants wished to free themselves from their obligations to the whole public to run a train as advertised they should publish notice of the change as extensively as they published notice of the regular trains. And as to the plaintiff, he was not bound by a notice published in the cars and stations which he did not see. If it had been published in the newspapers above mentioned, where his information had in fact been obtained, and he had neglected to look for it, the fault would have been his own.

The evidence as to the former usage of the defendants to make occasional changes was immaterial, because the advertisement was an express stipulation which superseded all customs that were inconsistent with it. An express contract cannot be controlled or varied by usage. Ware *v.* Hayward Rubber Co., 3 Allen, 84.

The court are of opinion that the defendants, by failing to give such notice of the change made by them in the time of running their train on the evening referred to as the plaintiff was entitled to receive, violated their contract with him, and are liable in this action.

Judgment for the plaintiff.

NUNN *v.* GEORGIA R. CO.

71 Ga. 710. 1883.

Action of damages for carrying beyond destination. The opinion states the case. The defendant had judgment below.

HALL, J. The plaintiff had a season ticket, commonly known as

a "book," which entitled him to travel on the cars of the defendant company from Atlanta to his home at Clarkston, — a point between the regular stations on the road at Decatur and Stone Mountain, at which trains stopped to put off and take on passengers when so notified. On the night in question he took passage at Atlanta for his home, and when he delivered the conductor his ticket he informed him that he had lost much sleep the night before, and would probably sleep on his journey, and requested him when he reached his destination, to awaken him and put him off, which the conductor promised to do. He slept until he passed beyond Stone Mountain, and below there was aroused, and informed that he had passed his home. Here he left the cars in the night, and walked rapidly in the dark a distance of seven or eight miles to his home, which he reached between 11 and 12 o'clock. During this walk he labored under considerable mental anxiety, on account of the situation of his wife, whom he had left in the morning quite sick, and gone to Atlanta to procure medicine for her; had obtained it, and then had it with him. He reached home in time to relieve her with the medicine he carried. He suffered from considerable soreness in consequence of his walk, was not able to do full work, and remained at home next day, and thereby lost his wages, amounting to two dollars. It did not appear from the evidence that the train was not halted at Clarkston a sufficient length of time to enable the plaintiff to get off, or that the place was not called in the customary manner; nor was it shown by any regulation of the company that it undertook that the conductor at each stopping-place should go through the train and see that every passenger was safely passed out of the cars. It was shown that the conductor, when specially applied to, had in some instances performed this service for passengers. It was incumbent upon the plaintiff to make out his case, and to show that he had been damaged by a violation of his contract with the company. In the opinion of the Superior Court he failed in this, and on motion a nonsuit was awarded at the close of the testimony, first, because the proof failed to show that it was customary for the conductor to go through the train and wake up a passenger who happened to be asleep. Secondly, because no breach of plaintiff's contract with the defendant was shown, or that there was any proof of a failure to stop at the designated point sufficiently long for the plaintiff to get off the cars. Thirdly, because it did not satisfactorily appear whether the loss of the day's work, which was the only damage proved, was caused by the failure to put plaintiff off at home, and by the long walk he took in consequence of being carried beyond it, or by other causes, which might have contributed to that result, such as the loss of sleep on the previous night.

In determining the propriety of this ruling, it will be essential to consider whether the conductor's promise to wake plaintiff was included in the company's contract to transport him from Atlanta to

Charleston; if it was, and there was any failure in that respect, then there was a breach of the agreement, and he had a right to recover at least nominal damages; if it was not, then a failure in regard thereto was *damnum absque injuria*, his rights were not violated, he was not entitled to recover, and the nonsuit was properly awarded.

"The sale of a ticket to a passenger is a contract to carry him according to the reasonable regulations of the company, and he is presumed also to contract with reference to them." Pierce Am. Ry. Law, 491. It likewise seems a necessary implication from this rule, that the train should be stopped at the point of destination a sufficient length of time to allow the party to leave it with safety to his life and person, 51 Ga. 489; 45 Ga. 288; and if he is carried beyond his place, by no fault of his, but by the failure of the company's agent to do his duty in that behalf, he is entitled to recover any damage he may sustain. Id.

It is insisted that if not directly bound to perform such acts as the present, the conductor, as the company's servant, was impliedly authorized to bind the company by this promise, and his failure to perform it would render the company liable. This is likened to the ability of the servant to contract debts for the master, growing out of the peculiar nature of the business, and from which authority is necessarily implied, in order to carry out the agency. Wood Mast. and Serv. §§ 263, 267, 268, are cited to this latter effect. But we cannot reach that conclusion. It was certainly not necessary to the performance of the ordinary duties of the conductor in putting passengers off the train that he should give them any other than the customary warning, and opportunity to avail themselves of it. The regulations under which he acted required nothing more at the hands of the company; its contract was made with that view, and any requirement in excess of it would be a departure from the terms of the contract. To this additional act the company did not assent.

In Pennsylvania R. Co. *v.* Kilgore, 32 Penn. St. 294, it is said: "We do not think it was the duty of the conductor to go through the train and see that every person was safely passed out of the cars. It was his duty to stop the train sufficiently long enough to enable them to get out without damage to their persons or their lives; and if he did not, he was derelict in his duty."

In New Orleans, Jackson & Great Northern R. Co. *v.* Statham, 42 Miss. 607, 613, the Supreme Court of that State applied this principle to sick and impotent persons. Shackleford, C. J., who delivered the opinion, declared that "railroad cars were not travelling hospitals, nor their employees nurses. Sick persons have the right to enter the cars of a railroad company; as common carriers of passengers, they cannot prevent their entering their cars. If they are incapable of taking care of themselves, they should have attendants along to care for them, or to render them such assistance

as they may require in the cars, and to assist them from the cars at the point of their destination. It is not the duty of conductors to see to the debarkation of passengers. They should have the stations announced; they should stop the trains sufficiently long for the passengers for each station to get off. When this is done their duty to the passengers is performed. All assistance that a conductor may extend to ladies without escorts, or with children, or to persons who are sick, and ask his assistance in getting on and off trains, is purely a matter of courtesy, and not at all incumbent upon him in the line of his public duty."

See also the able and learned opinion of Hardy, C. J., in Southern R. Co. *v.* Kendrick, 40 Miss. 374, which covers and effectually disposes of every question considered here. These cases proceed upon the reasonable ground that passengers are vigilant to perform their parts of the undertaking which they set out to accomplish, and which is only to be done by their own exertions. It results also from the difference of the obligations of carriers of goods and of passengers; in the former case, the obligation is to carry and deliver; in the latter, it is simply to carry and allow passengers sufficient time and opportunity to leave the vehicle. Hutch. Carr., § 614; Thomp. Car Pass. 226, 227, and citations. As to duty of passengers to observe the known and obvious rules of the company in entering and leaving cars, 2 Redf. Am. Ry. Cas., 536, 540–542; 3 Am. and Eng. R. Cases, 340.

How far a custom upon the part of conductors, known, or which may be presumed to be known to the company, to assist unattended females or children, or infirm persons, will modify these rules, we do not now decide, as there is nothing in this case falling within such a principle. This was a drowsy man, travelling a distance of ten miles; he made no contract with the company to have him aroused, in case he should be asleep when he reached his destination; he relied upon the courtesy of the conductor to do him this kind office, as it seems he had on previous occasions done for him, and perhaps for some others. These exceptional and occasional instances afforded no evidence of a custom binding upon the company. The plaintiff failed to make out any case, and there was no error in sustaining the motion for a nonsuit.

Judgment affirmed.

6. LIMITATION OF LIABILITY.

RAILWAY CO. *v.* STEVENS.

95 U. S. 655. 1877.

Error to the Circuit Court of the United States for the District of Maine.

This was an action on the case for negligence, brought against the Grand Trunk Railway of Canada, to recover damages for injuries received by Stevens whilst a passenger in its cars. The plaintiff, being owner of a patented car-coupling, was negotiating with the defendant, at Portland, Me., for its adoption and use by the latter, and was requested by the defendant to go to Montreal to see the superintendent of its car department in relation to the matter, the defendant offering to pay his expenses. The plaintiff consented to do this; and, in pursuance of the arrangement, he was furnished with a pass to carry him in the defendant's cars. This pass was in the usual form of free passes, thus, "Pass Mr. Stevens from Portland to Montreal," and signed by the proper officer. On its back was the following printed indorsement: —

"The person accepting this free ticket, in consideration thereof, assumes all risk of all accidents, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person, or for any loss or injury to the property, of the passenger using the ticket. If presented by any other person than the individual named therein, the conductor will take up this ticket and collect fare."

The plaintiff testified that he put the pass into his pocket without looking at it; and the jury found specially that he did not read the indorsement previous to the accident, and did not know what was indorsed upon it. He had been a railroad conductor, however, and had seen many free passes, some with a statement on the back, others without.

During the passage from Portland to Montreal, the car in which the plaintiff was riding ran off the track and was precipitated down an embankment, and he was much injured. The direct cause of the accident, according to the proof, was that, at the place where it occurred, and for some considerable distance in each direction, the bolts had been broken off the fish-plates which hold the ends of the rails together, so that many of these plates had fallen off on each side, leaving the rails without lateral support. The consequence was that the track spread, and the cars ran off, as before stated.

There was also evidence that at this place the track was made of old rails patched up.

The above facts appeared on the plaintiff's case, and the defendant offered no evidence, but requested the court to instruct the jury as follows: —

First, That if the plaintiff, at the time of sustaining the injury, was travelling under and by virtue of the pass produced in evidence in the case, he was travelling upon the conditions annexed to it.

Second, That if the plaintiff, at the time of sustaining the injury, was travelling under and by virtue of the pass produced in evidence in the case, the defendant is not liable.

Third, That if the plaintiff, at the time of sustaining the injury, was travelling as a free passenger, the defendant is not liable.

Fourth, That if the plaintiff, at the time of sustaining the injury, was travelling as a gratuitous passenger, without any consideration to the defendant for his transportation, the defendant is not liable.

The court refused these instructions, as inapplicable to the evidence produced, and instructed the jury as follows, viz.: —

That if the jury find that, in May, 1873, the plaintiff was interested in a car-coupling, which had been used on the cars of the defendant since December previous, and that the officers of the company were desirous that the plaintiff should meet them at Montreal to arrange about the use of such couplings on their cars by defendant, and they agreed with him to pay his expenses if he would come to Montreal, and he agreed so to do, and took passage on defendant's cars, and was, by the reckless misconduct and negligence of the defendant, and without negligence on his part, injured whilst thus a passenger in defendant's car, the defendant is not exonerated from liability to plaintiff for his damages occasioned by such negligence, by reason of the indorsement upon the pass produced in evidence.

There was a verdict and judgment for the plaintiff. The defendant then sued out this writ of error.

Mr. Justice Bradley. It is evident that the court below regarded this case as one of carriage for hire, and not as one of gratuitous carriage, and that no sufficient evidence to go to the jury was adduced to show the contrary; and, hence, that under the ruling of this court in Railroad Company *v.* Lockwood, 17 Wall. 357, it was a case in which the defendant, as a common carrier of passengers, could not lawfully stipulate for exemption from liability for the negligence of its servants. In taking this view we think the court was correct. The transportation of the plaintiff in the defendant's cars, though not paid for by him in money, was not a matter of charity nor of gratuity in any sense. It was by virtue of an agreement, in which the the mutual interest of the parties was consulted. It was part of the consideration for which the plaintiff consented to take the journey to Montreal. His expenses in making that journey

were to be paid by the defendant, and of these the expense of his transportation was a part. The giving him a free pass did not alter the nature of the transaction. The pass was a mere ticket, or voucher, to be shown to the conductors of the train, as evidence of his right to be transported therein. It was not evidence of any contract by which the plaintiff was to assume all the risk; and it would not have been valid if it had been. In this respect it was a stronger case than that of Lockwood's. There the pass was what is called a "drover's pass," and an agreement was actually signed, declaring that the acceptance of the pass was to be considered as a waiver of all claims for damages or injury received on the train. The court rightly refused, therefore, in the present case, to charge that the plaintiff was travelling upon the conditions indorsed on the pass, or that, if he travelled on that pass, the defendant was free from liability. And the court was equally right in refusing to charge, that, if the plaintiff was a free or gratuitous passenger, the defendant was not liable. The evidence did not sustain any such hypothesis. It was uncontradicted, so far as it referred to the arrangement by virtue of which the journey was undertaken.

The charge actually given by the court was also free from material error. It stated the law as favorably for the defendant as the latter had a right to ask. If subject to any criticism, it is in that part in which the court supposed that the jury might find that the plaintiff was injured by the reckless misconduct and negligence of the defendant. If this degree of fault had been necessary to sustain the action, there might have been some difficulty in deducing it from the evidence. However, the condition of the track where the accident took place, without any explanation of its cause, was perhaps sufficient even for such an inference. If the defendant could have shown that the injury to the rails was the result of an accident occurring so shortly before the passage of the train as not to give an opportunity of ascertaining its existence, it did not do so, but chose to rest upon the evidence of the plaintiff. In fact, however, negligence was all that the plaintiff was bound to show; and of this there was abundant evidence to go to the jury. On the whole, therefore, we think that the charge presents no sufficient ground for setting aside the verdict. The charge, if not formally accurate, was not such as to prejudice the defendant.

It is strongly urged, however, that the plaintiff, by accepting the free pass indorsed as it was, was estopped from showing that he was not to take his passage upon the terms therein expressed; or, at least, that his acceptance of the pass should be regarded as competent, if not conclusive, evidence that such a pass was in the contemplation of the parties when the arrangement for his going to Montreal was made. But we have already shown that the carrying of the plaintiff from Portland to Montreal was not a mere gratuity. To all it such would be repugnant to the essential character of the

whole transaction. There was a consideration for it, both good and valuable. It necessarily follows, therefore, that it was a carrying for hire. Being such, it was not competent for the defendant, as a common carrier, to stipulate for the immunity expressed on the back of the pass. This is a sufficient answer to the argument propounded. The defendant, being, by the very nature of the transaction, a common carrier for hire, cannot set up, as against the plaintiff, who was a passenger for hire, any such estoppel or agreement as that which is insisted on.

Since, therefore, from our view of the case, it is not necessary to determine what would have been the rights of the parties if the plaintiff had been a free or gratuitous passenger, we rest our decision upon Railroad Company *v.* Lockwood, *supra.* We have no doubt of the correctness of the conclusion reached in that case. We do not mean to imply, however, that we should have come to a different conclusion, had the plaintiff been a free passenger instead of a passenger for hire. We are aware that respectable tribunals have asserted the right to stipulate for exemption in such a case; and it is often asked, with apparent confidence, "May not men make their own contracts, or, in other words, may not a man do what he will with his own?" The question, at first sight, seems a simple one. But there is a question lying behind that: "Can a man call that absolutely his own which he holds as a great public trust, by the public grant, and for the public use as well as his own profit?" The business of the common carrier, in this country at least, is emphatically a branch of the public service; and the conditions on which the public service shall be performed by private enterprise are not yet entirely settled. We deem it the safest plan not to anticipate questions until they fairly arise and become necessary for our decision. *Judgment affirmed.*[1]

BATES *v.* OLD COLONY R. CO.

147 Mass. 255. 1888.

Tort for personal injuries sustained by the plaintiff, on November 4, 1885, in an accident upon the defendant's railroad while he was riding in a baggage car. At the trial in the Superior Court, before Sherman, J., evidence was introduced tending to prove the following facts.

It was conceded by the defendant that the accident resulted from negligence on the part of its servants, and that the plaintiff, if rightfully in the car, was, at the time of the accident, in the exercise of due care. None of the passenger cars in the same train with the

[1] *Contra:* Bissell *v.* New York Central R. Co., 25 N. Y. 442. (1862.)

baggage car were thrown from the track by the accident, and no person in them was injured.

The plaintiff was employed as an express messenger by the New York & Boston Despatch Express Company, which was carrying on the express business over the road of the defendant between South Framingham and Fitchburg. On January 1, 1885, and at the time of the accident, the contract between the defendant and the express company was, that the defendant should transport the express matter at a specific price, and should transport the messengers of the express company in its express cars or baggage cars at season ticket rates, which were less than regular rates paid by the express company upon condition that the express company and its messengers should assume all risks of accidents and injuries resulting therefrom, and hold the railroad free and discharged from all claims and demands in any way growing out of any injuries received by such messengers while being thus transported. In pursuance of that agreement, the plaintiff, on February 9, 1885, at the request of the express company, executed, and the express company delivered to the defendant, the following agreement: —

"Old Colony Railroad Company. Boston, February 9, 1885. Whereas, under the rules of the Old Colony Railroad Company, passengers are not allowed to ride in the baggage cars of any trains, but the undersigned, holder of a season-ticket, being engaged in the express business, is desirous of riding in such car for the more convenient despatch of his business as an expressman, it is understood and agreed that, in consideration of said company allowing him to ride in baggage cars on its trains, the undersigned will assume all risk of accidents and injuries resulting therefrom, and will hold said company free and discharged from all claims and demands in any way growing out of any injuries received by him while so riding."

The agreement was sent to the plaintiff, with a letter from the superintendent of the express company asking him to sign it, and he signed it unwillingly, but did so because he understood that, if he did not, the railroad company would demand that he should be removed by the express company from his position as messenger. The defendant thereupon issued to the express company, for the plaintiff, a season ticket, which contained a provision that "it is not to be used except on express business, and if so used will be forfeited," and differed from those issued to passengers generally in having stamped upon it this provision: "The holder of this ticket, having released the company from all liability, will be permitted to ride in the baggage car. J. Sprague, Jr., General Passenger Agent."

It was contrary to the rules of the railroad company to permit passengers to ride in baggage cars and express cars, and this provision was stamped upon the ticket for the purpose of showing to conductors that the person holding that ticket had released the company from liability, and therefore the rule need not be enforced in this

case. While the plaintiff was riding in a baggage car, as an express messenger, under the above arrangement with the express company and contract signed by himself, and holding a ticket thus stamped, he received his injuries. The following regulation, signed by the defendant's general manager, was posted and enforced in the baggage car in which the plaintiff rode while in the employment of the express company as a messenger on the defendant's road and at the time of the accident :—

"Old Colony Railroad. Notice. No passenger will be allowed to ride in the baggage car of any train unless he has signed a release discharging the company from all claims and demands in any way growing out of any accident or injuries while riding in such car. Conductors and baggage-masters will be particular at all times not to permit any passenger to ride in the baggage car without the special permit, which will be stamped on the tickets of those who have complied with the regulations. This rule must be strictly enforced."

Two other express companies — one a local company which had no messenger in charge of its express matter, the same being cared for by the messengers of the other companies, and the other the Vermont and Canada Express, which had a messenger riding in the baggage car under this regulation — were doing business over that portion of the defendant's road during the year 1885, and at the time of the accident. The express business over the defendant's railroad was carried on in the baggage car attached to its passenger train, by messengers riding therein, under agreements and upon tickets like that signed and held by the plaintiff.

The defendant contended that, upon the above facts, the plaintiff could not recover, and asked the judge to rule : "1. The agreement and release is a bar to the plaintiff's recovery. 2. If the release is void and not a bar, the plaintiff was, as a passenger, guilty of contributory negligence by being in the baggage car, contrary to the known reasonable regulation that passengers were not allowed to ride in the baggage car. 3. On the whole evidence, the plaintiff is not entitled to recover, and the verdict should be for the defendant."

The judge declined to rule as requested, but ruled that the plaintiff was entitled to recover, notwithstanding the regulation and agreement, and submitted the case to the jury upon the question of damages only. The jury returned a verdict for the plaintiff for $10,000; and the defendant alleged exceptions.

W. Allen, J. The rules of the defendant prohibited passengers from riding in baggage cars, and the plaintiff had no right as a passenger to ride where he was riding at the time he was injured. He was there under a special contract, by which, in consideration that the defendant would allow him to ride in the baggage cars, he assumed all risk of accident and injuries resulting therefrom, and agreed to hold the defendant free and discharged from all claims and demands growing out of any injury received by him while so

ruling. The parties plainly intended to include injuries resulting from the negligence of the defendant's servants.

We need not consider whether the contract would be construed or held to include injuries to which riding in the baggage car did not contribute. There was evidence tending to show that the plaintiff would not have been injured had he been in a passenger car, and that his presence in the baggage car directly contributed to the injury. The ruling of the court ordering a verdict for the plaintiff was a ruling that the plaintiff was entitled to recover for an injury caused by the negligence of the defendant's servants, although his riding in the baggage car contributed to the injury. In considering the correctness of this ruling, the contract of the plaintiff must be taken to have been, that he would assume the risk of injury from the negligence of the defendant's servants to which his riding in the baggage car under the permission given by the defendant should contribute. The objection is, that the contract is void, as without consideration, as unreasonable, and as against public policy. We see no objection to the contract as construed and applied in this case.

It was the duty of the defendant as a carrier of passengers to transport persons over its road on their paying the established fare, and to see that its servants used due care to secure the safety of its passengers. It was its duty to give to persons paying the established rates tickets which would be evidence of their right to carriage, and of the defendant's obligation to carry them with due care. The defendant was ready to do this, and did sell to the plaintiff a season ticket which gave to him all the rights of a passenger. The contract in question was made to give him a right which did not belong to him as a passenger. The plaintiff, having the rights of a passenger, desired to ride in a baggage car. The regulations of the defendant, as well as personal prudence, forbade him to ride there, and, if he had attempted to do so, he not only would have assumed all the risks of injuries resulting therefrom, but would have been liable to be expelled from the car by the defendant.

It is difficult to see upon what ground it can be contended that an agreement of the plaintiff, that, in consideration that the defendant would permit him to ride in the baggage car, he would assume all risk of injuries resulting therefrom, is unreasonable or illegal. The defendant was under no obligation to give the permission, and the effect of the plaintiff's agreement was only that the liability of the defendant should not be increased by the permission that the plaintiff, if he should be injured in consequence of being in the baggage car, should not be entitled to recover damages of the defendant, on the ground that he was there by its permission. The contract did not diminish the liability of the defendant. It left the risk assumed by the plaintiff in riding in the baggage car what it

would have been without the contract; it only secured him against being ejected from the car.

The question of the right of carriers to limit their liability for negligence in the discharge of their duty as carriers by contracts with their customers or passengers in regard to such duties, does not arise under this contract as construed in this case. See Railroad Co. *v.* Lockwood, 17 Wall. 357; Griswold *v.* New York & New England Railroad, 53 Conn. 371. It was not a contract for carriage over the road, but for the use of a particular car. The consideration of the plaintiff's agreement was not the performance of anything by the defendant which it was under any obligation to do, or which the plaintiff had any right to have done. It was a privilege granted to the plaintiff. The plaintiff was not compelled to enter into the contract in order to obtain the rights of a passenger. Having these rights, he sought something more. The contract by which he obtained what he sought did not impair his rights as a passenger, and he was under no compulsion to enter into it.

It is contended that the plaintiff, as the servant of the express company, had a right, by statute, to ride in the baggage car, and that, therefore, the case comes within the decisions that it is unreasonable, and against public policy, for a person, as a condition of his becoming a passenger on a railroad, to agree that he will take the risk of the negligence of the servants of the railroad in transporting him. The express company is a common carrier, and it is not contended that a railroad corporation is bound to transport, in the baggage cars of its passenger trains, the merchandise and servants of another common carrier, unless required to do so by some statute. See Sargent *v.* Boston & Lowell Railroad, 115 Mass. 416 [**76**]; Express Cases, 117 U. S. 1.

The statute relied on is c. 112, § 188, of the Public Statutes, which is in these words: "Every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents and servants, and of any merchandise and other property upon its railroad, and for the use of its depot and other buildings and grounds, and, at any point where its railroad connects with another railroad, reasonable and equal terms and facilities of interchange." The statute cannot be construed to require railroad corporations to discriminate in favor of express companies, and to carry their merchandise and messengers in the baggage cars of passenger trains on reasonable terms, equally favorable to all express companies. If that were the meaning of the statute, no questions as to the equality of the terms given to the plaintiff or the company he represented would arise. The same contract was required of all other express messengers who rode in baggage cars. The only question that would arise is whether the terms granted were reasonable.

The fact that the plaintiff was riding in the baggage car as an express messenger, in charge of merchandise which was being transported there, shows more clearly that the contract by the express company and the plaintiff was not unreasonable or against public policy. He was there as a servant, engaged with the servants of the railroad corporation in the service of transportation on the road. His duties were substantially the same as those of the baggage-master in the same car: the latter relating to merchandise carried for passengers, and the former to merchandise carried for the express company. His actual relations to the other servants of the railroad corporation engaged in the transportation were substantially the same as those of the baggage-master, and would have been the same had he been paid by the corporation instead of by the express company. Had the railroad done the express business, the messenger would have been held by law to have assumed the risk of the negligence of the servants of the railroad.

It does not seem that a contract between the express company and the plaintiff on the one hand, and the defendant on the other, that the express messenger, in performing his duties, should take the same risk of injury from the negligence of the servants of the railroad engaged in the transportation that he would take if employed by the railroad to perform the same duties, would be void as unreasonable or as against public policy. When we add the considerations that the plaintiff was a passenger whose rights as such were not impaired by the agreement, and that the agreement was to assume the risk of injuries resulting from his riding in baggage cars, in consideration of being permitted to ride there to conduct the express business, it seems clear that the contract is a valid and sufficient defence to an action against the defendant for injuries resulting from the negligence of the defendant's servants, to which the fact that the plaintiff was riding in the baggage car under the agreement contributed.

Exceptions sustained.

QUIMBY *v.* BOSTON, ETC. R. CO.

150 Mass. 365. 1890.

Tort for personal injuries occasioned to the plaintiff in an accident upon the defendant's railroad, through the alleged negligence of its servants. Trial in the Superior Court, before MASON, J., who reported the case for the determination of this court, in substance as follows:

It was admitted that at the time when the injuries were received the plaintiff was travelling upon a free pass given to him at his

solicitation by the general manager of the defendant corporation. The face of the pass bore the following: —

"1062. Trip Pass. Boston and Maine Railroad. Pass Asa Quimby and wife, Account of Boston and Maine R. R., from Salem to Concord, N. H., provided he signs the agreement on the back hereof. Good until May 20, 1886, and not good for passage in the opposite direction. Boston, April 20, 1886. Jas. T. Furber, Gen'l Manager."

The face of the pass also bore upon its left-hand margin the words: "Read the other side."

Upon the back of the pass was the following: —

"1886. Agreement. In consideration of being given this free ticket by the Boston and Maine Railroad, I, the undersigned, hereby agree to assume all risk of accident, of every name and nature, which may happen to me while travelling on, or getting on or getting off, the trains of said railroad on which this ticket is honored for passage, by which I may be injured in my person, or for the loss of or damage to any of my property, being transported free of charge, in the same train with myself. [Here followed a blank space for the "Signature of holder of this free ticket."] If this free ticket is presented by any other than the person whose signature appears above, conductors will take it up and collect fare."

The pass had not been signed by the plaintiff, but he was travelling upon it when his injuries were received. He had tendered it to the conductor of the train, who had honored it as good for his passage, and had twice punched it. No oral testimony was introduced as to whether the plaintiff had read or had not read the language printed upon the pass.

The defendant admitted the negligence of its servants, but contended that it was not liable to the plaintiff by reason of the fact that he was riding upon the free pass when injured; and asked the judge to instruct the jury, that, upon the above facts, the plaintiff could not maintain his action; and the judge, being of the opinion that the action could not be maintained, submitted the case on the question of damages only to the jury, who returned a verdict assessing the plaintiff's damages.

If upon the above facts the plaintiff was entitled to recover, judgment was to be entered upon the verdict; otherwise, judgment was to be entered for the defendant.

Devens, J. When the plaintiff received his injury, he was travelling upon a free pass, given him at his own solicitation and as a pure gratuity, upon which was expressed his agreement that in consideration thereof he assumed all risk of accident which might happen to him while travelling on or getting on or off the trains of the defendant railroad corporation on which the ticket might be honored for passage. The ticket bore on its face the words, "Provided he signs the agreement on the back hereof." In fact, the agreement was not signed by the plaintiff, he not having been

required to do so by the conductor, who honored it as good for the passage, and who twice punched it. The fact that the plaintiff had not signed it, and was not required to sign it, we do not regard as important. Having accepted the pass, he must have done so on the conditions fully expressed therein, whether he actually read them or not. Squire *v.* New York Central Railroad, 98 Mass. 239; Hill *v.* Boston, Hoosac Tunnel, & Western Railroad, 144 Mass. 284; Boston & Maine Railroad *v.* Chipman, 146 Mass. 107.

The object of the provision as to signing is to furnish complete evidence that the person to whom the pass is issued assents thereto; but one who actually avails himself of such a ticket, and of the privileges it confers, to secure a passage, cannot be allowed to deny that he made the agreement expressed therein because he did not and was not required to sign it. Gulf, Colorado, & Santa Fé Railway *v.* McGown, 65 Texas, 640, 643; Illinois Central Railroad *v.* Read, 37 Ill. 484; Wells *v.* New York Central Railroad, 24 N. Y. 181; Perkins *v.* New York Central Railroad, 24 N. Y. 196. If this is held to be so, the case presents the single question whether such a contract is invalid, which has not heretofore been settled in this State, and upon which there has been great contrariety of opinion in different courts. If the common carrier accept a person as a passenger, no such contract having been made, such passenger may maintain an action for negligence in transporting him, even if he be carried gratuitously. Having admitted him to the rights of a passenger, the carrier is not permitted to deny that he owes to him the duty which, as carrying on a public employment, he owes to those who have paid him for the service. Todd *v.* Old Colony & Fall River Railroad, 3 Allen, 18; Commonwealth *v.* Vermont & Massachusetts Railroad, 108 Mass. 7; Littlejohn *v.* Fitchburg Railroad, 148 Mass. 478; Files *v.* Boston & Albany Railroad, 149 Mass. 204; Philadelphia & Reading Railroad *v.* Derby, 14 How. 468; Steamboat New World *v.* King, 16 How. 469 [572]. But the question whether the carrier may, as the condition upon which he grants to the passenger a gratuitous passage, lawfully make an agreement with him by which the passenger must bear the risks of transportation, obviously differs from this.

In a large number of cases, the English courts, as well as those of New York, have held that where a drover was permitted to accompany animals upon what was called a free pass, issued upon the condition that the user should bear all risks of transportation, he could not maintain an action for an injury received by the negligence of the carrier's servants. A similar rule would, without doubt, be applied where a servant, from the peculiar character of goods, such as delicate machinery, is permitted to accompany them, and in other cases of that nature. That passes of this character are free passes properly so called has been denied in other cases, as the passage of the drover is a part of the contract for the carriage of

the animals. The cases on this point were carefully examined and criticised by Mr. Justice Bradley, in Railroad Co. *v.* Lockwood, 17 Wall. 357, 367; and it is there held that such a pass is not gratuitous, as it is given as one of the terms upon which the cattle are carried. The decision is put upon the ground that the drover was a passenger carried for hire, and that with such passenger a contract of this nature could not be made. The court, at the conclusion of the opinion, expressly waives the discussion of the question here presented, and, as it states, purposely refrains from expressing any opinion as to what would have been the result had it considered the plaintiff a free passenger, instead of one for hire. Railway Co. *v.* Stevens, 95 U. S. 655 [**644**], in which the same distinguished judge delivered the opinion of the court, is put upon the ground that the transportation of the defendant, although not paid for by him in money, was not a matter of charity or gratuity in any sense, but was by virtue of an agreement in which the mutual interest of the parties was consulted.

Whether the English and New York authorities rightly or wrongly hold that one travelling upon a drover's pass, as it is sometimes called, is a free passenger, they show that, in the opinion of those courts, a contract can properly be made with a free passenger that he shall bear the risks of transportation. This is denied by many courts whose opinions are entitled to weight. It will be observed that in the case at bar there is no question of any wilful or malicious injury, and that the plaintiff was injured by the carelessness of the defendant's servants. The cases in which the passenger was strictly a free passenger, accepting his ticket as a pure gratuity, and upon the agreement that he would himself bear the risk of transportation, are comparatively few. They have all been carefully considered in two recent cases, to which we would call attention. These are Griswold *v.* New York & New England Railroad, 53 Conn. 371, decided in 1885, and that of Gulf, Colorado, & Santa Fé Railroad *v.* McGown, 65 Texas, 640, decided in 1886, in which the precise question before us was raised and decided, after a careful examination of the authorities, and opposite conclusions reached, by the highest courts of Connecticut and of Texas. No doubt existed in either case, in the opinion of the court, that the ticket of the passenger was strictly a gratuity, and it was held by the former court that, under these circumstances, the carrier and the passenger might lawfully agree that the passenger should bear the risks of transportation, and that such agreement would be enforced, while the reverse was held by the court of Texas. We are brought to the decision of the question unembarrassed by any weight of authority without the Commonwealth that can be considered as preponderating.

It is urged on behalf of the plaintiff, that, while the relation of passenger and carrier is created by contract, it does not follow that the duty and responsibility of the carrier is dependent

upon the contract; that, while with reference to matters indifferent to the public, parties may contract according to their own pleasure, they cannot do so where the public has an interest; that, as certain duties are attached by law to certain employments, these cannot be waived or dispensed with by individual contracts; that the duty of the carrier requires that he should convey his passengers in safety; and that he is properly held responsible in damages if he fails to do so by negligence, whether the negligence is his own or that of his servants, in order that this safety may be secured to all who travel. It is also said, that the carrier and the passenger do not stand upon an equality; that the latter cannot stand out and higgle or seek redress in the courts; that he must take the alternative the carrier presents, or practically abandon his business in the transfer of merchandise, and must yield to the terms imposed on him as a passenger; that he ought not to be induced to run the risks of transportation by being allowed to travel at a less fare, or for any similar reason, and thus to tempt the carrier or his servants to carelessness which may affect others as well as himself; and that, in few words, public policy forbids that contracts should be entered into with a public carrier by which he shall be exonerated from his full responsibility. Most of this reasoning can have no application to a strictly free passenger, who receives a passage out of charity, or as a gratuity.

Certainly the carrier is not likely to urge upon others the acceptance of free passes, as the success of his business must depend on his receipts. There can be no difficulty in the adjustment of terms where passes are solicited as gratuities. When such passes are granted by such of the railroad officials as are authorized to issue them, or by other public carriers, it is in deference largely to the feeling of the community in which they are exercising a public employment. The instances cannot be so numerous that any temptation will be offered to carelessness in the management of their trains, or to an increase in their fares, in both of which subjects the public is interested. In such instances, one who is ordinarily a common carrier does not act as such, but is simply in the position of a *gratuitous bailee*. The definition of a common carrier, which is that of a person or corporation pursuing the public employment of conveying goods or passengers for hire, does not apply under such circumstances. The service which he undertakes to render is one which he is under no obligation to perform, and is outside of his regular duties. In yielding to the solicitation of the passenger, he consents for the time being to put off his public employment, and to do that which it does not impose upon him. The plaintiff was in no way constrained to accept the gratuity of the defendant; it had been yielded to him only on his own solicitation. When he did, there is no rule of public policy, we think, that prevented the carrier from prescribing, as the condition of it, that it should not be com-

pelled, in addition to carrying the passenger gratuitously, to be responsible to him in damages for the negligence of its servants. It is well known that, with all the care that can be exercised in the selection of servants for the management of the various appliances of a railroad train, accidents will sometimes occur from momentary carelessness or inattention. It is hardly reasonable that, beside the gift of free transportation, the carrier should be held responsible for these, when he has made it the condition of his gift that he should not be. Nor, in holding that he need not be under these circumstances, is any countenance given to the idea that the carrier may contract with a passenger to convey him for a less price on being exonerated from responsibility for the negligence of his servants. In such a case the carrier would still be acting in the public employment exercised by him, and should not escape its responsibilities, or limit the obligations which it imposes upon him.

In some cases it has been held that while a carrier cannot limit his liability for gross negligence, which has been defined as his own personal negligence (or that of the corporation itself, where that is the carrier), he can contract for exemption from liability for the negligence of his servants. It may be doubted whether any such distinction in degrees of negligence, in respect to the right of a carrier to exempt himself from responsibility therefor, can be profitably made or applied. Steamboat New World *v.* King, 16 How. 469. It is to be observed, however, that in the case at bar the injury occurred through the negligence of defendant's servants, and not through any failure on the part of the corporation to prescribe proper rules or to furnish proper appliances for the conduct of its business. We are of opinion that where one accepts, purely as a gratuity, a free passage in a railroad train, upon the agreement that he will assume all risk of accident which may happen to him, while travelling in such train, by which he may be injured in his person, no rule of public policy requires us to declare such contract invalid and without binding force. By the terms of the report there must, therefore, be

Judgment for the defendant.

JACOBUS *v.* SAINT PAUL, ETC. R. CO.

20 Minn. 125. 1873.

THE plaintiff brought this action to recover damages for personal injury sustained while travelling as a passenger upon defendant's railroad, occasioned, as is alleged, by the negligence of the defendant. The defences were, that the plaintiff was travelling upon a free pass or ticket, issued to him without consideration, by accept-

ing which he assumed all risks of accident; that contrary to the regulations of the defendant, well known to plaintiff, he was riding in a baggage car, when the accident occurred; that plaintiff's own negligence contributed to the injury, without any negligence of defendant.

The cause was tried in the Court of Common Pleas for Ramsey County, resulting in a verdict for the plaintiff. Defendant moved to set aside the verdict, and for a new trial, upon the grounds: "1st. That the verdict is not justified by the evidence, and is contrary to law. 2d. Errors of law occurring at the trial, excepted to by the defendant." The motion was denied, and defendant appeals to this court. The same points are made in this court, and are so fully discussed in the opinion, that no further statement is necessary.

Berry, J. The plaintiff brings this action to recover damages for injuries occasioned to his person by the alleged gross negligence of defendant's servants in charge of defendant's railway train, upon which plaintiff was travelling. Plaintiff was riding upon a free pass, which, together with the conditions indorsed, is in these words, viz.: —

"St. Paul & Chicago Railway.

"Pass D Jacobus upon the conditions indorsed hereon, until Dec. 31st, 1871, unless otherwise ordered. Not transferable.

"D. C. Shepard, Chf. Eng. and Supt.

"Conditions.

"The person who accepts and uses this free ticket thereby assumes all risk of accident, and agrees that the company shall not be liable under any circumstances, whether of negligence of its agents or otherwise, for an injury of the person, or for any loss or injury to his property, while using or having the benefit of it."

Upon the pleadings and the charge of the court, the first question arising in this case is, whether the pass, with its conditions, protects defendant from liability for injury received by plaintiff while riding upon such pass, even though the injury was caused by gross negligence upon defendant's part. In our opinion, this question should be answered in the negative. For the reason that the degree of care and diligence exacted of a bailee should be proportioned to the importance of the business and of the interests at stake (Halley v. Boston Gas Light Co., 8 Gray, 131; 57 Me. 202), "the law imposes upon the common carrier of passengers the greatest care and foresight for the safety of his passengers, and holds him liable for the slightest neglect." McLean v. Burbank, 11 Minn. 288. And for like reasons the same extreme care is required, though the passenger be carried gratuitously. Having undertaken to carry, the duty arises to carry safely. Phil. & Reading R. R. Co. v. Derby, 14 Howard (U. S.), 486; Nolton v. Western Railway, 15 N. Y. 444, 532; Steamboat New World v. King, 16 How. (U. S.), 474

[**572**]; 2 Redfield on Railways, 184–5, and notes; Perkins *v.* N. Y. Central R. W. Co., 24 N. Y. 200; Todd *v.* Old Col. & F. R. R. Co., 3 Allen, 21.

In the case at bar, however, the plaintiff was not merely a gratuitous passenger; *i. e.*, a passenger carried without payment of fare or other consideration. He was a passenger upon a free pass expressly conditioned that the defendant should not be liable to him for any injury of his person while he was using or having the benefit of such pass. Does this circumstance distinguish his case from that of a merely gratuitous passenger? Upon the question whether conditions of this kind are valid and effectual to exonerate the carrier of passengers, the adjudications differ. In New York, the conditions appear to be held sufficient to absolve the carrier from liability, even for the gross negligence of his employees. Wells *v.* N. Y. Central Railway Co., 24 N. Y. 181; Perkins *v.* Same, ib. 196; Bissell *v.* Same, 25 N. Y. 442. In New Jersey, it is held that such conditions are good as against ordinary negligence, with a very decided intimation that the exemption from liability comprehends gross negligence also. Kinney *v.* Cen. R. R. Co., 34 N. J. 513.

In Pennsylvania, Illinois, Indiana, and several other States, the courts hold that no such condition will avail to protect the carrier from responsibility for the gross negligence of its employees. Ill. Central Co. *v.* Read, 37 Ill. 484; 19 id. 136; The Ind. Cen. R. Co. *v.* Munday, 21 Ind. 48; Penn. R. Co. *v.* McCloskey's Adm'r, 23 Pa. 532; Mobile & Ohio Railway *v.* Hopkins, 41 Ala. 489.

There are two distinct considerations upon which the stringent rule as to the duty and liability of carriers of passengers rests. One is a regard for the safety of the passenger on his own account, and the other is a regard for his safety as a citizen of the State. The latter is a consideration of public policy growing out of the interest which the State or government as *parens patriæ* has in protecting the lives and limbs of its subjects. Shearman & Redfield on Negligence, § 24; C. P. & A. R. Co. *v.* Curran, 19 Ohio State, 12; Phil. and Reading R. R. Co. *v.* Derby, *supra;* Steamboat New World *v.* King, *supra;* Smith *v.* N. Y. Central R. Co., 24 N. Y. 222; Ill. C. R. Co. *v.* Read, *supra;* Penn. R. Co. *v.* Henderson, 51 Penn. 315; Bissell *v.* N. Y. C. R. Co., 25 N. Y. 455, per Denio, J.; N. Y. Central R. Co. *v.* Lockwood (U. S. Supreme Ct.), not yet reported.

So far as the consideration of public policy is concerned, it cannot be overridden by any stipulation of the parties to the contract of passenger carriage, since it is *paramount* from its very nature. No stipulation of the parties in disregard of it, or involving its sacrifice in any degree, can, then, be permitted to stand. Whether the case be one of a passenger for hire — a merely gratuitous passenger — or of a passenger upon a conditioned free pass, as in this instance, the

interest of the State in the safety of the citizen is obviously the same. The more stringent the rule as to the duty and liability of the carrier, and the more rigidly it is enforced, the greater will be the care exercised, and the more approximately perfect the safety of the passenger. Any relaxation of the rule as to duty or liability naturally, and it may be said inevitably, tends to bring about a corresponding relaxation of care and diligence upon the part of the carrier. We can conceive of no reason why these propositions are not equally applicable to passengers of either of the kinds above mentioned.

It is said, however, that it is unreasonable "to suppose that the managers of a railroad train will lessen their vigilance and care for the safety of the train and its passengers because there may be a few on board for whom they are not responsible." In the first place, if this consideration were allowed to prevail, it would prove too much; for it could be urged with equal force and propriety in the case of a merely gratuitous passenger, as in a case like this at bar. Yet, as we have seen, no such consideration is permitted to relieve the carrier from the same degree of liability for a gratuitous passenger, as for a passenger for hire.

Again, suppose (what is not at all impossible or improbable, as, for instance, in case of a free excursion), that most or all of the passengers upon a train were gratuitous, or riding upon conditioned free passes, the consideration urged would be no answer to a claim that the carrier should be responsible. A general rule can hardly be based upon such calculations of chances. Moreover, while it might not ordinarily occur that the presence of a free passenger upon a train, for injury to whom the carrier would not be liable, would tend to lessen the carrier's sense of responsibility and his vigilance, it still remains true that the greater the sense of responsibility, the greater the care; and that *any* relaxation of responsibility is dangerous.

Besides these considerations, it is to be remembered that the care and vigilance which a carrier exercises do not depend alone upon a mere sense of responsibility, or upon the existence of an abstract rule imposing stringent obligations upon him. It is the enforcement of the rule, and of the liability imposed thereby, — the mulcting of the carrier for his negligence which brings home to him in the most practicable, forcible, and effectual way, the necessity for strictly fulfilling his obligations.

It may be that on a given occasion the gratuitous passenger, or the passenger upon a free pass, is the only person injured (as, for aught that appears, was the fact in this instance), or the only party who will proceed against the carrier, the only person who will practically enforce upon the carrier the importance of a faithful discharge of his duty. These considerations, as it seems to us, seem to be decisive upon the point that sound public policy requires

that the rule as to the liability of the carrier for the safety of the passenger should not be relaxed, though the passenger be gratuitous, or, as in this case, riding upon a conditioned free pass. It is contended that there was no proof of gross negligence on defendant's part, and that, therefore, the verdict was not justified. There was evidence that the train was a mixed train; that it was running from forty to forty-five miles an hour according to the plaintiff, and, according to the other witnesses, from fifteen to twenty-two miles an hour; that the lumber was upon a platform car, and that the stake of the lumber car, in consequence of the breaking of which the injury occurred, was a stick of butternut cord wood, and was cross-grained. There was also the testimony of J. T. Maxfield, of St. Paul, a passenger who appears to be an intelligent and entirely disinterested witness, and who says, "I felt anxious about the lumber car. I was afraid of the speed. . . . I was apprehensive of danger from the character of our train. I spoke to the brakeman about it. . . . Have travelled on trains a good deal." And taking all these facts together — to say nothing about others appearing in the case — it cannot be said that there was not evidence in the case proper to be considered by the jury, and having some reasonable tendency to establish negligence, which has been well described as being a negative word signifying the absence of such care as it is the duty of the negligent party to exercise in the particular case. Grill *v.* General, &c., Collier Co., Law Rep., 1 C. P. 612; Steamboat New World *v.* King, *supra*. We will go further even, and say that the evidence, in our opinion, had a reasonable tendency to establish gross negligence in the sense of a great degree of negligence. Angell on Carriers, § 22. As to the point of the degree of negligence necessary to sustain this action, it is, however, to be remarked, in view of the stringent rule as to liability, that where the question is between a railway carrier and a passenger, there would seem to be no occasion for the ordinary distinction of different degrees of negligence, as slight, ordinary, and gross. As is well and forcibly said by Mr. Justice Grier in Philad. & Reading R. Co., *supra:* "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.'" So in Steamboat New World *v.* King, Mr. Justice Curtis, referring to the doctrine thus announced, says: "We desire to be understood to re-affirm that doctrine as resting not only on public policy, but on sound principles of law." A similar view of the impracticability of a distinction between different kinds of negligence as applicable to cases of this kind is taken in Perkins *v.*

N. Y. Central R. Co., *supra*. The carrier being bound to exercise the greatest care, and being liable for the slightest neglect, what is said by Rolfe, B., in Wilson *v.* Brett, 11 Mees. & Welsby, 113, and indorsed by Willis, J., in Grill *v.* General, &c., Collier Co., Law Rep., 1 C. P. 612, is in point in a case of this kind, viz.: that he "could see no difference between *negligence* and *gross* negligence; that it was the same thing with the addition of a vituperative epithet." See also Angell on Carriers, § 23, and Briggs *v.* Taylor, 28 Vt. 180.

It is further argued on behalf of the defendant, that the plaintiff, by his own negligence, contributed to the injury sustained, and for that reason he cannot recover. This argument is founded upon the fact that plaintiff was in the baggage car at the time of the accident, and, as defendant contends, wrongfully there. But, in the first place, the evidence is conflicting as to whether or not the plaintiff was informed of the rule of the company excluding passengers from the baggage car. If he was not so informed, and was suffered to remain there without objection, it could hardly be said that his presence there was negligence. Dunn *v.* Grand Trunk Railway, 58 Maine, 187. Again, if it be admitted that the plaintiff was duly informed of the regulation of the company excluding passengers from the baggage car, the evidence shows that he was, at least, *permitted* to remain there by the conductor. If he was thus permitted to remain, so that he was there with the knowledge of the conductor, and without any attempt on the part of the conductor to enforce the company's rule by removing him, his presence there would not be such negligence as would exonerate the defendant from the consequences of its negligence or want of care. On the contrary, his presence there, under such circumstances, would render it the duty of the company, in view of the fact that he was there, to exercise the highest care required for his safety, and to refrain from the slightest neglect tending to his injury. Dunn *v.* Grand Trunk Railway, *supra*; Isbel *v.* N. Y. & New Haven Railway Co., 27 Conn. 303; 2 Redfield Railway Cases, 474–502.

Still, again, admitting that the plaintiff was cognizant of the rule of the company excluding passengers from the baggage car, and that he persisted in remaining there without the permission or consent, yet with the knowledge of the conductor, and was guilty of negligence in so doing, this negligence would not prevent his recovering unless it were contributory to the injury received. To be thus contributory, in a legal sense, it must be a *proximate* cause of the injury, — that is, it must have been near in the order of causation (Shearman and Redfield on Negligence, 37–38), and it must have contributed, to some extent, directly to the injury, and must have been not a mere technical or formal wrong contributing either incidentally or remotely, or not at all, to the injury. Isbel *v.* N. Y. and N. H. R. R. Co., *supra*; 2 Redfield R. Cases, 485–490. Now,

notwithstanding the fault or negligence of the plaintiff in remaining in the baggage car, and admitting that the baggage car was a place of greater danger than the passenger car, and that the plaintiff would not have been injured if he had not been there, his presence there with the knowledge of the conductor made it defendant's duty to exercise care to avoid injuring him while there; and if injury resulted from want of such care, the defendant is liable, Isbel *v.* N. Y. and N. H. R. Co., *supra.* If the injury resulted from want of such care, *i. e.*, negligence on defendant's part — such negligence, and not plaintiff's fault in being in the baggage car, would be the immediate and direct — *the more proximate* — cause of the injury, and defendant would be responsible for the same. Isbel *v.* N. Y. and N. H. R. Co. *supra;* C. C. and C. R. Co. *v.* Elliott, 4 Ohio State, 476; Shearman and Redfield on Negligence, § 25; Keith *v.* Pinkham, 43 Me. 503; Huelsenkamp *v.* Citizens' Railway Co., 37 Mo. 537; Richmond *v.* Sac. R. R. Co., 18 Cal. 351; Lackawanna and Bloomsburg R. Co. *v.* Chenewith, 52 Penna. 386.

In our opinion there was evidence in the case for the consideration of the jury in reference to these views of the law, and from which they might reasonably find that plaintiff's negligence in this case was not contributory to the injury received by him.

These considerations dispose of the case, the result being that the order denying a new trial is affirmed.

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7. TICKETS.

JEROME *v.* SMITH.

48 Vt. 230. 1876.

Case for ejecting plaintiff from defendants' cars.

Wheeler, J. . . . . .

As the case states that certain facts appeared on the trial and others were found by special verdict, it hangs here upon the correctness of the judgment rendered upon all these facts. If on these facts the plaintiff was wrongfully in the defendants' cars at the time he was expelled, the judgment was right, otherwise not. The right to eject for non-payment of fare is given by statute, if statute authority can, in addition to common-law rights in such cases, on any ground be necessary. The real question is, whether there was, in fact, such non-payment. When the plaintiff bought the ticket at Worcester, with coupons attached, entitling the holder to ride over that part of defendants' road he was riding on when ejected, he did not make any agreement with them or their agents that they would carry him in person over it as carriers agree to carry particu-

lar packages over their routes; but he bought what was symbolic evidence of a right that whoever should have it might ride, and what any other person could use as well as he. The title to it, and right to a passage upon it, would pass by mere delivery, and whoever should have it could pay the fare of a passenger with it by delivering it in payment; but the mere fact of having had it, without having it to deliver in payment on reasonable request, would not entitle any one to the passage, any more than having a sufficient amount of money to pay the fare with, without paying it, would. When he entered on his passage over the defendants' road, he had the coupon and tickets which would pay his fare throughout his intended journey over their line, and if he had delivered the coupon to the conductor in payment of his fare for the whole of that journey, he would have had the right to ride the whole distance without doing or paying anything more. But, according to the facts, the conductor did not take the coupon as an equivalent for the full passage, but only for the passage so far as he was to go as conductor, and gave the plaintiff the white check as evidence in lieu of the coupon, more symbolic, but equally effective of the right to a passage the rest of the way. As the plaintiff did not know what the symbols of the check each meant, so probably he did not know what those on the ticket and those on the coupon, respectively, meant; but, however that may have been, such checks are in common use among conductors on railroads, as evidence of the right to a passage, and the case not only does not show but that he understood what the purpose and effect of this one was, as persons ordinarily would, but does impliedly show that he did so understand, because it appears that he searched for it to use to pay his fare with when he saw the next conductor approaching him collecting fares. And although it was delivered to him only by placing it in his hat-band, as he did not object, that was as much a delivery to him as placing it in his lap or in his hand would have been, and was sufficient to invest him with the ownership of it, and to bind him to take care of it as his own property. While he held that check he had not paid his fare beyond where the conductor was to go, but had what would pay it, or that of any other person, the rest of the way. If the conductor had not given him anything, or had given him something that he could not use to pay his fare with, he would have received no equivalent for his coupon, and would have still been entitled to his passage for an equivalent. But as it was what he took was as good as the coupon for the rest of his journey, and with it he was situated the same as if he had kept the coupon, or if he had bought the check of a station-agent or conductor at the commencement of his journey, as evidence of his right to a passage, and shown it to one conductor and was keeping it to show to the next one. In either case, the duty of keeping it safely would be upon him. When he had lost it, the loss was his, and he was

situated as he would have been if the coupon had been returned to him, and he had lost that, and as any one would be who had bought a ticket to an opera or a lecture, or that would entitle the holder of it to any other privilege, and had lost it. Having lost it, he was called upon by the proper conductor to pay his fare. He had not any ticket or check to pay it with, and refused to pay it in money, consequently, there was a refusal to pay it at all, and the conductor rightfully expelled him from the train.

The books and cases cited in behalf of the plaintiff are not, apparently, contrary to these views. Thus, in Pittsburgh, etc., R. R. *v.* Hennigh, 39 Ind. 509, the first conductor took up the ticket and gave no check nor anything showing a right to a passage, and the next one ejected the passenger for want of anything to show payment. The company was very properly held liable for that expulsion. In Palmer *v.* Charlotte, etc. R. R. Co., 3 S. C. 580, the plaintiff had a ticket which gave him the right to stop over at Columbia; the conductor took it up and gave him a check that did not show any right to stop over. He stopped over, and, on presentation of the check on the next train, was expelled. The court said that the conductor had no right to take up the ticket unless he placed the passenger in as good condition as he was in before, by giving a check or token evidencing his right to stop over and take a subsequent train. In Maroney *v.* Old Colony R. R. Co., 106 Mass. 153, the plaintiff had a ticket that was purchased of the agent of the defendants, and was apparently good for any regular train, and he was ejected from a regular train because by some rule, of which he had no notice, it was intended only for a special train. In Hamilton *v.* Third Av. R. R. Co., 53 N. Y. 25, the plaintiff paid his fare and received nothing to show he was entitled to a passage, and was ejected before he had the passage for which he had expressly paid. In Moore *v.* Fitchburg R. R. Co., 4 Gray, 465, the plaintiff had bought a ticket and given it up on his passage without receiving any evidence of a right to a passage in return, and was expelled before he had the rest of his passage. The other books and cases cited for the plaintiff, so far as observed, relate to the general rules of liability of carriers in respect to the persons and baggage of passengers who have with money or by tickets paid for and entered upon passage for some particular journey, and do not bear directly upon the question in this case. On the other hand, numerous authorities among those cited in behalf of the defendants sustain these views more or less directly. Among those most nearly in point are Hamilton *v.* N. Y. C. R. R., 51 N. Y. 100; Standish *v.* Narragansett Steamship Co., 111 Mass. 512; Townsend *v.* N. Y. C. & H. R. R. R. Co., 56 N. Y. 295 [**691**]; Duke and Wife *v.* G. W. R. R. Co., 14 Up. Can. C. B. 369. According to these conclusions the judgment for the defendants was correct.

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STATE *v.* OVERTON.

24 N. J. L. 435. 1854.

The Chief Justice. The defendant was convicted in the Oyer and Terminer of Morris, of an assault and battery upon Theodore A. Canfield. A motion having been made for a new trial, upon the ground that the charge of the court was erroneous, and that the verdict was against law and contrary to the evidence, the question was reserved and submitted to this court for its advisory opinion.

The material facts are, that on the 18th of March, 1853, Canfield, the prosecutor, procured at the office of the Morris & Essex Railroad Company, in Newark, a passenger's ticket to Morristown. He paid for the ticket the regular fare from Newark to Morristown, and took his seat in the cars. At Millville, one of the way stations upon the road, he left the train. Before leaving the cars he received from Van Pelt, the conductor of that train, a conductor's check, upon which was printed the words "conductor's check to Morristown." About an hour afterwards Canfield took the next train of cars which passed the Millville Station for Morristown, of which train Overton, the defendant, was conductor. Upon being asked by the conductor for his fare, Canfield tendered in payment the check received by him from Van Pelt, the conductor of the train in which Canfield had first taken his seat; this the conductor refused to accept, and the passenger refusing to pay his fare, and declining to leave the cars upon request, he was, without unnecessary force or violence, and without personal injury, removed by the defendant from the cars, at one of the way stations upon the road, before reaching Morristown. The company furnished, at the office in Newark, through tickets to Morristown, and also tickets to Millville and other way stations upon the route. The cost of a ticket directly from Newark to Morristown was less than the cost of a ticket to Millville and another ticket thence to Morristown. Some years previous to the transaction, the company had given public notice that conductor's checks were not transferable from one train to another.

It was not questioned upon the trial that a railroad company are not bound to carry a passenger, unless upon payment or tender of his fare; that they may, in such case, either refuse to permit him to enter the cars, or having entered them, they may require him to leave them before the termination of the journey; and that if he refuses to leave, they may remove him at a suitable time and place, using no unnecessary force. The ground upon which the conviction was asked was that, in fact, the passenger had paid his fare;

that he offered to the conductor competent and satisfactory evidence of that fact, and that, consequently, the act of the conductor in removing him from the cars was illegal.

Had the passenger in fact paid his fare, or was the check given by the conductor of another train, evidence of that fact? He had, it is admitted, paid his fare to Morristown, by the train in which he originally took his passage. Did that authorize him to leave the train at any point upon the road, and to resume his place for his original destination in a different train, at his pleasure?

The question is obviously a question of contract between the passenger and the company. By paying for a passage, and procuring a ticket from Newark to Morristown, the passenger acquired the right to be carried directly from one point to the other, without interruption. He acquired no right to be transported from one point to another upon the route, at different times and by different lines of conveyance, until the entire journey was accomplished. The company engaged to carry the passenger over the entire route for a stipulated price. But it was no part of their contract that they would suffer him to leave the train, and to resume his seat in another train, at any intervening point upon the road. This contract with the passenger would have been executed, if they had proceeded directly to Morristown, without stopping at any intervening point; nor could he have complained of a violation of contract, if no other train had passed over the road, in which he might have completed his journey. If the passenger chose voluntarily to leave the train before reaching his destination, he forfeited all rights under his contract. The company did not engage, and were not bound to carry him in any other train, or at any other time, over the residue of the route.

The production of the conductor's ticket in nowise altered the case or affected the terms of the original contract. It was evidence, indeed, that the holder had paid his passage, and was entitled to be carried to Morristown. But how and when? Why, clearly, according to the terms of his original contract. It was evidence that he had paid his fare to Morristown, and was entitled to be carried there by the train in which he had originally taken his passage; for that purpose alone it was given to him; that train he had left voluntarily, without the knowledge or assent of the conductor, and without giving up his check. The check was therefore valueless; the right, of which it was the evidence, the passenger had voluntarily relinquished.

This is the clear legal effect of the contract between the company and the passenger, in the absence of any evidence to the contrary. If the passenger insists that under his contract, by virtue of general usage or the custom upon the road, he is entitled to be carried at his pleasure either by one or by different trains, and at different times, over various portions of his journey, the burden of proof was

upon the State. No such usage was established, although some evidence was offered upon the trial, for the purpose of proving it.

The defendant offered evidence to show that some years previous to the transaction the company had adopted a rule, and given public notice, that the conductor's check was not transferable from one train to another. This, properly considered, is a simple warning to passengers, that they would be carried strictly according to the terms of their contract. Even if a previous custom had been proved (which it was not) for passengers to be carried over different parts of their journey by different trains, it was a mere warning that in the future the custom would not prevail. Upon the trial this action of the company was presented to the court, and by them submitted to the jury, as if it were a by-law or regulation of the company affecting the rights of passengers, upon the reasonableness and consequent validity of which the jury were to decide. The court clearly intimated its opinion, that the regulation of the company was valid, but, under the influence of the ruling of another tribunal, submitted the validity of the regulation as a matter of fact to the jury.

In this the court erred. Here was no evidence of any by-law, or of any regulation made by the company, affecting the rights of passengers, upon the reasonableness or validity of which either court or jury were called upon to decide. The right of the passenger rested upon his contract. The notice given by the company was in strict conformity with his rights under the contract. Upon the evidence in the cause, if no proof had been offered of the notice given by the company, that conductor's checks were not transferable, the defendant would have been entitled to a verdict. Proof of that notice certainly placed him in no worse position. The company have an unquestionable right, under their charter, independent of any by-law or regulation, to charge different rates by different trains, or a higher price for travelling over the road as a way-passenger, by different journeys, than for a through passenger. This was in reality all that was involved in the evidence of the action by the company, as proved upon the trial. The case does not fall within the operation of the principle, by which it was held to be controlled.

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KEELEY *v.* BOSTON & MAINE R. CO.

67 Me. 163. 1878.

Case, setting out in substance and in extended legal form and phraseology that the defendants were common carriers of passengers, that the plaintiff purchased two tickets, one of the following

form: "163. Issued by Grand Trunk R. R., and Boston & Maine R. R., Portland to Boston. Valid only within seven days. First class. Form 39. J. Hickson, General Manager, 3376," and another, similar in form, but which he is unable to describe; that he entered the defendants' cars at Portland for Boston, whither he was carried; that he gave up the "similar" ticket on his passage to Boston, when the defendants promised and assured the plaintiff that the ticket "described" was good for a passage for him over the defendants' railway from Boston to Portland; that on the 26th day of January, 1876, at Boston, he entered the cars to be conveyed to Portland, and was in pursuance of said payments and ticket (described) conveyed to South Lawrence, where he was ordered out; that he re-entered and was conveyed to Haverhill; that the defendants then ordered him to leave the cars and ejected him therefrom and refused to carry him to Portland.

The plea was, not guilty.

Peters, J. This case presents this question: Does a railroad ticket, with the words, "Portland to Boston" imprinted on it, purchased in Portland under no contract other than what is inferable from the ticket itself, entitle the holder to a passage, on the road of the company issuing it, from Boston to Portland? Does a ticket one way give the right to pass the other way instead? We find no case deciding that it does, nor do we assent to the proposition that the law should be considered to be so. Such is not the contract which the ticket is evidence of.

It has been held that, if a passenger purchases a ticket with a notice upon it that it is "good for one day only" in the absence of a statutory regulation to the contrary, he can travel upon such ticket only on that day. State *v.* Campbell, 32 N. J. L. 309; Shedd *v.* Troy & Boston Railroad, 40 Vt. 88; Johnson *v.* Concord Railroad, 46 N. H. 213; Boston & Lowell Railroad Co. *v.* Proctor, 1 Allen, 267; 1 Redf. on Railways, 99, and notes. It has been held also that if the words "good upon one train only" are printed upon a ticket, the holder is not entitled to change from one train to another after the passage is begun. Cheney *v.* Boston & Maine R. R. Co., 11 Met. 121. Redf. on Railways, *supra*. If such notices confine a passenger to a certain day and a particular train, why is there not as much reason to say in this case that the notice upon the ticket must restrict the holder of it to go in the particular direction named?

This position is not weakened by the suggestion that the company can transport the passenger as cheaply and easily one way as the other. If it were so, it would be no answer. A person who agrees to sell to another, merchandise of one kind, might find it to his profit and advantage to deliver merchandise of another kind, but he cannot be compelled to do so.

So a railroad could often, no doubt, transport a passenger as con-

conjointly on one train as another and on one day as another; still, as before seen, there is no obligation to do so. But it does not follow that a railroad corporation can carry passengers as well for itself the one way as the other. There may be a difference arising from various considerations. There may be more travellers and more freight to be carried one way than the other. It may be more expensive. There may be more risk in the one passage than the other. The up train may go more by daylight and the down train more by night. That such considerations as these might arise in a case, whether in this instance they exist or not, helps to demonstrate that a ticket one way is a different thing from a ticket the other. Practically, the doctrine set up by the plaintiff, if allowed to prevail, would affect the defendants injuriously. It is well known that through tickets are cheaper *pro rata* than the way or local fares. This fact has led to a practice on the part of way travellers of buying through tickets and using them over a part of the route and selling them for the balance of the distance, so as to make a saving from the regular prices charged. It is easily seen that, if a passenger is permitted to ride in either direction on a ticket, it increases the chances for carrying on this sort of speculation against the interests of the road.

It does not avail the argument for the plaintiff at all, that before this he had passed over the road upon other tickets in a direction the reverse of that advertised upon their face; nor is it of any importance that another conductor upon another train at another time expressed an opinion to him that his ticket would be for either direction good. The contract is not shorn of a particular stipulation merely because it is not always enforced. Nor could such conductor in such manner bind the corporation, and it could not have been understood by the plaintiff that he undertook to do so. The conductor merely expressed an opinion about the matter which he at that time had no business with. The plaintiff had ample opportunity to purchase another ticket, and should have done so. Wakefield *v.* South Boston Railroad, 117 Mass. 544.

Plaintiff nonsuit.

AUERBACH *v.* N. Y. C. & H. R. R. CO.

89 N. Y. 281. 1882.

Earl, J. This action was brought by the plaintiff to recover damages for being ejected from one of the defendant's cars while he was riding therein as a passenger. He was nonsuited at the trial, and the judgment entered upon the nonsuit was affirmed at the General Term. The material facts of the case are as follows: The

plaintiff, being in St. Louis on the 21st day of September, 1877, purchased of the Ohio and Mississippi Railway Company a ticket for a passage from St. Louis over the several railroads mentioned in coupons annexed to the ticket to the city of New York. It was specified on the ticket that it was "good for one continuous passage to point named on coupon attached;" that in selling the ticket for passage over other roads the company making the sale acted only as agent for such other roads, and assumed no responsibility beyond its own line; that the holder of the ticket agreed with the respective companies over whose roads he was to be carried to use the same on or before the 26th day of September then instant, and that, if he failed to comply with such agreement, either of the companies might refuse to accept the ticket, or any coupons thereof, and demand the full regular fare which he agreed to pay. He left St. Louis on the day he bought the ticket, and rode to Cincinnati, and there stopped a day. He then rode to Cleveland and stayed there a few hours, and then rode on to Buffalo, reaching there on the 24th, and stopped there a day. Before reaching Buffalo he had used all the coupons except the one entitling him to a passage over the defendant's road from Buffalo to New York. The material part of the language on that coupon is as follows: —

"Issued by Ohio and Mississippi Railway on account of New York Central and Hudson River Railroad one first-class passage, Buffalo to New York."

Being desirous of stopping at Rochester, the plaintiff purchased a ticket over the defendant's road from Buffalo to Rochester, and upon that ticket rode to Rochester on the 25th, reaching there in the afternoon. He remained there about a day, and in the afternoon of the 26th of September he entered one of the cars upon the defendant's road to complete his passage to the city of New York. He presented his ticket, with the one coupon attached, to the conductor, and it was accepted by him, and was recognized as a proper ticket and punched several times, until the plaintiff reached Hudson about three or four o'clock, A. M., September 27th, when the conductor in charge of the train declined to recognize the ticket on the ground that the time had run out, and demanded three dollars fare to the city of New York, which the plaintiff declined to pay. The conductor with some force then ejected him from the car.

The trial judge nonsuited the plaintiff on the ground that the ticket entitled him to a continuous passage from Buffalo to New York, and not from any intermediate point to New York. The General Term affirmed the nonsuit upon the ground that, although the plaintiff commenced his passage upon the 26th of September, he could not continue it after that date on that ticket.

We are of opinion that the plaintiff was improperly nonsuited. The contract at St. Louis, evidenced by the ticket and coupons there sold, was not a contract by any one company or by all the

companies named in the coupons jointly for a continuous passage from St. Louis to New York. A separate contract was made for a continuous passage over each of the roads mentioned in the several coupons. Each company through the agent selling the ticket made a contract for a passage over its road, and each company assumed responsibility for the passenger only over its road. No company was liable for any accident or default upon any road but its own. This was so by the very terms of the agreement printed upon the ticket. Hence the defendant is not in a position to claim that the plaintiff was bound to a continuous passage from St. Louis to New York, and it cannot complain of the stoppage at Cincinnati and Cleveland. Hutchinson on Carriers, sec. 579; Brooke *v.* The Grand Trunk Railway Co., 15 Mich. 332.

But the plaintiff was bound to a continuous passage over the defendant's road; that is, the plaintiff could not enter one train of the defendant's cars and then leave it, and subsequently take another train, and complete his journey. He was not, however, bound to commence his passage at Buffalo. He could commence it at Rochester or Albany, or any other point between Buffalo and New York, and then make it continuous. The language of the contract and the purpose which may be supposed to have influenced the making of it do not require a construction which would make it imperative upon a passenger to enter a train at Buffalo. No possible harm or inconvenience could come to the defendant if the passenger should forego his right to ride from Buffalo and ride only from Rochester or Albany. The purpose was only to secure a continuous passage after the passenger had once entered upon a train. On the 26th of September the plaintiff having the right to enter a train at Buffalo, it cannot be perceived why he could not, with the same ticket, rightfully enter a train upon the same line at any point nearer to the place of destination.

When the plaintiff entered the train at Rochester on the afternoon of the 26th of September, and presented his ticket, and it was accepted and punched, it was then used within the meaning of the contract. It could then have been taken up. So far as the plaintiff was concerned, it had then performed its office. It was therefore left with him not for his convenience, but under regulations of the defendant for its convenience that it might know that his passage had been paid for. The contract did not specify that the passage should be completed on or before the 26th, but that the ticket should be used on or before that day, and that it was so used it seems to us is too clear for dispute.

The language printed upon the ticket must be regarded as the language of the defendant, and if it is of doubtful import the doubt should not be solved to the detriment of the passenger. If it had been intended by the defendant that the passage should be continuous from St. Louis to New York, or that it should actually

commence at Buffalo and be continuous to the city of New York, or that the passage should be completed on or before the 26th of September, such intention should have been plainly expressed and not left in such doubt as might and naturally would mislead the passenger.

We have carefully examined the authorities to which the learned counsel for the defendant has called our attention, and it is sufficient to say that none of them are in conflict with the views above expressed.

The judgment should be reversed and a new trial granted, costs to abide the event.

BOYLAN *v.* HOT SPRINGS R. CO.

132 U. S. 146. 1889.

This was an action of *assumpsit* against a railroad corporation by a person who, after taking passage on one of its trains, was forcibly expelled by the conductor.

At the trial in the Circuit Court, the plaintiff testified that on March 18, 1882, he purchased at the office of the Wabash, St. Louis, and Pacific Railway Company in Chicago a ticket for a passage to Hot Springs and back (which is copied in the margin,[1] and which, as was alleged in the declaration and appeared upon the face of the ticket, was then signed by him as well as by the ticket agent, and witnessed by a third person), and upon this ticket travelled on the defendant's railroad to Hot Springs.

He was asked by his counsel when he first actually knew that the ticket required him to have it stamped at Hot Springs. The question was objected to by the defendant, and ruled out by the court.

He further testified that on April 19, 1882, when leaving Hot Springs on his return to Chicago, he went to the baggage-office and requested the baggage-master to check his baggage, and, on his asking to see the ticket, showed it to him, and he thereupon punched the ticket, checked the baggage, and gave him the checks for it; and also that the gateman asked to see the ticket, and he showed it to him, and then passed through the gate and took his seat in the cars. This testimony was objected to by the defendant, on the ground that no statement or action of the baggage-master, or of the gateman, would constitute a waiver of any of the written conditions of the contract; and it was admitted by the court, subject to the objection.

The plaintiff then testified that soon after leaving Hot Springs the conductor, in taking the tickets of passengers, came to him,

[1] [The terms of the ticket sufficiently appear, without setting out the copy.]

and, upon being shown his ticket, said it was not good, because he had failed to have it stamped at Hot Springs; the plaintiff replied that the baggage-master, when checking his baggage, had said nothing to him about it, and he did not know it was necessary; the conductor answered that he must either go back to Hot Springs and have the ticket stamped, or else pay full fare, but did not demand any specific sum of fare, or tell him what the fare was, and upon his refusing to pay another fare or to leave the train, forcibly put him off at the next station, notwithstanding he resisted as much as he could, and in so doing injured him in body and health.

On motion of the defendant, upon the grounds, among others, that this was an action of *assumpsit* for breach of contract, and that the plaintiff failed to produce to the conductor a ticket or voucher which entitled him to be carried on the train, and that until the plaintiff identified himself at the office at Hot Springs and had the ticket stamped and signed by the agent there, he had no subsisting contract between himself and the defendant for a return passage to Chicago, the court declined to permit the plaintiff to testify to the consequent injury to his business and to his ability to earn money, excluded all evidence offered as to the force used in removing him from the train, and as to his expulsion from the train (although corresponding to allegations inserted in the declaration), and directed a verdict for the defendant.

The plaintiff excepted to the rulings of the court, and, after verdict and judgment for the defendant, sued out this writ of error.

Mr. Justice Gray. This is an action of *assumpsit*, and cannot be maintained without proof of a breach of contract by the defendant to carry the plaintiff. The only contract between the parties was an express one, signed by the plaintiff himself as well as by the defendant's agent at Chicago, and contained in a ticket for a passage to Hot Springs and back. The plaintiff, having assented to that contract by accepting and signing it, was bound by the conditions expressed in it, whether he did or did not read them or know what they were. The question, when he first knew that the ticket required him to have it stamped at Hot Springs, was therefore rightly excluded as immaterial.

By the express condition of the plaintiff's contract, he had no right to a return passage under his ticket, unless it bore the signature and stamp of the defendant's agent at Hot Springs; and no agent or employee of the defendant was authorized to alter, modify, or waive any condition of the contract.

Neither the action of the baggage-master in punching the ticket and checking the plaintiff's baggage, nor that of the gateman in admitting him to the train, therefore, could bind the defendant to carry him, or estop it to deny his right to be carried.

The plaintiff did not have his ticket stamped at Hot Springs, or make any attempt to do so, but insisted on the right to make the

return trip under the unstamped ticket, and without paying further fare. As he absolutely declined to pay any such fare, the fact that the conductor did not inform him of its amount is immaterial.

The unstamped ticket giving him no right to a return passage, and he not having paid, but absolutely refusing to pay, the usual fare, there was no contract in force between him and the defendant to carry him back from Hot Springs.

There being no such contract in force, there could be no breach of it; and no breach of contract being shown, this action of *assumpsit*, sounding in contract only, and not in tort, cannot be maintained to recover any damages, direct or consequential, for the plaintiff's expulsion from the defendant's train. The plaintiff, therefore, has not been prejudiced by the exclusion of the evidence concerning the circumstances attending his expulsion and the consequent injuries to him or his business.

The case is substantially governed by the judgment of this court in Mosher *v.* St. Louis, Iron Mountain & Southern Railway, 127 U. S. 390, and our conclusion in the case at bar is in accord with the general current of decision in the courts of the several States. See, besides the cases cited at the end of that judgment, the following: Churchill *v.* Chicago & Alton Railroad, 67 Illinois, 390; Petrie *v.* Pennsylvania Railroad, 13 Vroom, 449; Pennington *v.* Philadelphia, Wilmington & Baltimore Railroad, 62 Maryland, 95; Rawitzky *v.* Louisville & Nashville Railroad, 40 La. Ann. 47.

Nor was anything inconsistent with this conclusion decided in either of the English cases relied on by the learned counsel for the plaintiff. Each of those cases turned upon the validity and effect of a by-law made by the railway company, not of a contract signed by the plaintiff; and otherwise essentially differed from the case at bar.

In Jennings *v.* Great Northern Railway, L. R. 1 Q. B. 7, the by-law required every passenger to obtain a ticket before entering the train, and to show and deliver up his ticket whenever demanded. The plaintiff took a ticket for himself, as well as tickets for three horses and three boys attending them, by a particular train, which was afterwards divided into two, in the first of which the plaintiff travelled, taking all the tickets with him; and when the second train was about to start, the boys were asked to produce their tickets, and, being unable to do so, were prevented by the company's servants from proceeding with the horses. An action by the plaintiff against the company for not carrying his servants was sustained, because the company contracted with him only, and delivered all the tickets to him; and Lord Chief Justice Cockburn, with whom the other judges concurred, said: "It is unnecessary to determine whether, if the company had given the tickets to the boys, and the boys had not produced their tickets, it would have been competent for the company to have turned them out of the carriage."

In Butler *v.* Manchester, Sheffield & Lincolnshire Railway, 21 Q. B. D. 207, the ticket referred to conditions published by the company, containing a similar by-law, which further provided that any passenger travelling without a ticket, or not showing or delivering it up when requested, should pay the fare from the station whence the train originally started. The plaintiff, having lost his ticket, was unable to produce it when demanded, and, refusing to pay such fare, was forcibly removed from the train by the defendant's servants. The Court of Appeal, reversing a judgment of the Queen's Bench Division, held the company liable, because the plaintiff was lawfully on the train under a contract of the company to carry him, and no right to expel him forcibly could be inferred from the provisions of the by-law in question, requiring him to show his ticket or pay the fare; and each of the judges cautiously abstained from expressing a decided opinion upon the question whether a by-law could have been so framed as to justify the course taken by the company. *Judgment affirmed.*

NASHVILLE, ETC. R. CO. *v.* SPRAYBERRY.

8 Baxt. (Tenn.) 341. 1874.

McFarland, J. Sprayberry purchased from an agent of the Nashville & Chattanooga R. R. Co., at Chattanooga, tickets for himself, wife, and two children from that place to Shreveport, La. The tickets are what are known as coupon tickets, and indicated the route to be by the Nashville & Chattanooga road to Nashville, and by other connecting roads to Memphis, and from that point to Shreveport by steamboat. After passing over the railroads to Memphis the party took the steamboat called the "Nick Wall," to which they were directed, and while on the route on the Mississippi River an accident occurred, in which the wife of Sprayberry and his two children were drowned. This action was brought by Sprayberry against the Nashville & Chattanooga R. R. Co. The drowning is averred to have been the result of the misconduct and want of skill of the officers and servants of the boat. A demurrer was filed upon the ground that the plaintiff could not maintain the action in his own name for wrongs or injuries causing the death of the wife and children. This, we think, was properly overruled. An action of this character is unknown to common law, and is only given by statute, and where such an action is given by statute and a remedy prescribed, that remedy must be pursued. As the injury occurred in the State of Mississippi, the right of action and the remedy prescribed by the statute of that State is the one to which the plaintiff was entitled. The statute of this State on the subject

has no application. The action, though predicated upon the Mississippi statute, may be brought in this State. In such case the declaration must aver the statute under which it is brought. This was sufficiently done. That statute gives the remedy to the husband and father, and we enforce that remedy in our courts.

The next question, and one of importance, is as to the liability of the Nashville and Chattanooga Railroad Company for injuries to the passengers caused by the wrongful acts, negligence, or want of skill in the officers and servants of the steamboat after the passengers had passed beyond their line. The declaration avers that the defendant was in partnership with the company or line of carriers owning the boat. This was put in issue. The judge, in his charge, instructed the jury in substance that it was not necessary for the plaintiff to prove this to entitle him to a recovery, but if the plaintiff purchased the tickets from an authorized agent of the defendant, the defendant thereby became bound for the transportation of the passengers over the entire line for which the tickets were sold, although beyond the terminus of its road; that the company selling the tickets incurs a responsibility as though the entire route was its own, unless it stipulated at the time for a less responsibility. This we understand to be the substance of the instructions to the jury on this question. This doctrine rests upon the theory that the contract is alone with the company from whom the tickets were purchased for the entire route, and that the connecting lines are but agents of the first in carrying out this contract, and as a consequence the acts or negligence of the servants causing the injury are the acts of the joint company. This is laid down as the true doctrine in Shearman & Redfield on Negligence, sec. 272, though it is conceded that the American cases do not always support it. The cases referred to in support of the position we have not had an opportunity to examine.

In the case of Carter & Hough *v.* Peck, 4 Sneed, 203, the language of the judge delivering the opinion of the court seems to favor this view. In that case, however, it appeared that the plaintiff purchased from the defendants, the proprietors of a stage line, through tickets from Nashville to Memphis; the defendants did not own the entire line, but had an arrangement with another company owning a stage line to receive the passengers at Waynesboro on the route and carry them to LaGrange for their share of the fare, from which point they were to be taken to Memphis by railway, but this arrangement was not known to the plaintiff. The connecting line at Waynesboro failed and refused to carry the plaintiff, and he was compelled to pay his fare upon another route. It was held that the plaintiff was entitled to hold the first company liable for this failure upon the ground that his contract was alone with them.

The case of Fustenheim *v.* The Memphis & Ohio R. R. Co., decided at Jackson by this court in April, 1872, was this, the plain-

tiff purchased a through ticket from New York to Memphis from the Pennsylvania Central Railroad Company, and received a check for his baggage, to be delivered at Memphis. It was held that upon this the plaintiff could not recover from the last company running into Memphis for an injury to his baggage, which occurred while on the Pennsylvania Central road; for this injury he must look to that company. We also referred to several cases, and one of them our own holding, that a carrier receiving freight to be carried beyond the terminus of its own road is responsible for its delivery at that point unless a different liability is stipulated for and these are as stated authorities holding that the same rule applies to passengers.

On the other hand, there are authorities holding that a different rule applies to passengers from the rule applicable to freight and baggage. That where tickets of this character are sold they are to be regarded as distinct tickets for each road sold by the first company as agent of the others, so far as passengers are concerned. This is the doctrine maintained by Judge Redfield in his work on carriers. He refers, among others, to the case of Ellsworth *v.* Tartt, 26 Ala. 733, in which he says the question was a good deal examined, and the rule laid down to be, "If the proprietors of different portions of a public line of travel, by an agreement among themselves, appoint a common agent at each end of the route to receive the fare and give through tickets, this does not of itself constitute them parties as to passengers, so as to render each one liable for losses occurring upon any portion of the line." He refers also to other authorities. See Redfield on Carriers, sec. 444. And the same author maintains the same doctrine in his work on the Law of Railways, vol. 2, sec. 201.

In this conflict of authority we are left to adopt the rule which to us seems supported by the soundest reason.

The extent and *termini* of great railway lines, owned and operated by companies incorporated by public laws, may be supposed to be known, at least in general, to persons of ordinary intelligence when they purchase tickets to travel over them, especially when this is shown by the tickets themselves. The system of selling through tickets is one of great importance and convenience to travellers, as it avoids trouble, besides securing in some instances lower rates. The theory that the company selling the ticket shall be held from this alone to have actually contracted to carry the passengers over roads besides its own, and that the owners of the other roads are but the agents of the first to carry out the contract, seems to us to be an arbitrary assumption, — a sort of legal fiction, — and contrary in some cases, at least, to the truth of the case. Assuming that in fact, the different lines of road are separate and distinct, and owned and controlled by different companies, with different agents and officers, and that there is no contract or privity between them in regard to carrying passengers, except the arrangement to sell through

tickets, and that these facts appear in proof, shall the fact that the first company, with the authority of the others, issues and sells the tickets, be held of itself to establish exactly contrary to the truth, that the other companies are but the agents and servants of the first? There is nothing in this record to indicate that the officers and agents of the steamboat whose wrongful acts or negligence are said to have caused the death of the plaintiff's wife and children, were the servants of this defendant, or in any manner under its control, except the simple fact that the defendant sold the tickets. To allow this of itself to establish this arbitrary conclusion against the truth, would be to attach unjust responsibility upon the company selling the tickets. We are of opinion that in such cases the company selling the ticket shall be regarded as the agent of the other lines when the tickets themselves impart this and nothing else appears, and the purchaser may well understand with whom the contract is made, and who is bound for its performance.

Of course the company selling the tickets may, by contract, either expressed or to be fairly implied from its acts, bind itself to be responsible for the entire route; but this should not be held conclusively established from the sale of the tickets alone, nor should it be held to throw upon the defendant the onus of proving that it expressly limited its liability. If a partnership in fact appear, the case would be different.

For this error the judgment must be reversed, and a new trial awarded.

CENTRAL R. CO. *v.* COMBS.

70 Ga. 533. 1883.

Action for breach of contract to carry a passenger. The opinion states the point. The plaintiff had judgment below.

Blandford, J. The defendants in error brought their separate actions in the Superior Court of Bibb County against the plaintiff in error, in which each alleged that he made a contract with the defendant (the plaintiff in error), that for and in consideration of the sum of $35.55, it would transport the plaintiff from the city of Macon, Georgia, to the city of Galveston, Texas; that he paid said amount to defendant, and that defendant issued and delivered to plaintiff a ticket, with certain coupons attached; that plaintiff travelled and was transported on said ticket as far as the city of New Orleans; that part of the ticket so purchased was over the Morgan line from New Orleans to Galveston; that he left the city of Macon on the 20th of August, 1879, and followed the directions given him by defendant, reaching New Orleans on the 21st of

August, 1879, and there the defendant failed and refused to carry him further on his journey, and the Morgan line failed and refused to carry plaintiff from New Orleans to Galveston. And it was further averred that there was no steamer running on the Morgan line from New Orleans, and had not been for a long time before the issuing of said ticket and the making of the contract, and that fact defendant knew before it sold the ticket. These are all the allegations in the declaration material to be considered by this court.

The defendant in the court below and plaintiff in error in this court filed a plea of the general issue.

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There are several questions made by this record. First, is a railroad company which sells and issues tickets to passengers and persons over its own lines of road and the lines of road of other companies, known as through tickets, liable for the sure and safe transportation of such passengers or persons to the point of destination, notwithstanding there may be indorsed or printed on the tickets so sold and issued, "that the company issuing and selling such tickets shall not be liable except as to its own line of road?" It has been held by this court, that when a passenger with a through ticket over a connecting line of railroads checks his baggage at the starting-point through to his destination, and upon arriving it is damaged and has been broken open and robbed, he may sue the road which issued the check, or he may sue the road delivering the baggage in bad order. Wolff *v.* Central Railroad Company, 68 Ga. 653; Hawley *v.* Screven, 62 Ga. 347. In 2 Redf. Railw., § 201, it is stated "that taking pay and giving tickets or checks through for the carriage of baggage of passengers, binds the first company, ordinarily, for the entire route." Yet this author, who cannot be considered as having any bias or prejudice against these corporations, does not assign any reason for the *dictum* above. He contents himself with citing the case of McCormick *v.* Hudson River R. Co., 4 E. D. Smith, 181.

It may be very safely assumed from these decisions that the law in this State is, that when a railroad company issues and sells a ticket over its own lines of road, and over the lines of other roads to a point designated, such company is liable to the passenger thus purchasing such ticket, who checks his baggage through on the line indicated in the ticket, for the safe and secure carriage and transportation of such baggage. And if the railroad company would be liable for the safe and secure transportation of the baggage of a passenger which is but a convenience and incident of the passenger, it cannot be very readily perceived why such company should not be liable for the safe and secure carriage and transportation of the passenger himself. Why is the company thus contracting liable for the transportation of the passenger's baggage? Is it not because such is the undertaking of such company?

In the case of Illinois C. R. *v.* Copeland, 24 Ill. 338, the Supreme Court of that State say this: "We hold the ticket and the check given by this company, and produced in evidence, imply a special undertaking to carry the passenger to St. Louis *via* the Terre Haute & Alton Railroad and his baggage also. The ticket is what is known as a through ticket, and the check denotes that the baggage is checked from Chicago to St. Louis, and both inform the passenger that the Illinois Central has running connections with the Terre Haute & Alton road, and that they can and will deliver the passenger and baggage, by means of this connection, at St. Louis. The ticket and check are both issued by the Illinois Central; they are the evidence of the contract made with them, and in effect speak this language: 'If you will buy this ticket we will carry you safely to St. Louis and your baggage also; the terminus of our road, by means of our connection with the Terre Haute & Alton road, is at St. Louis, and we guarantee to you your safe arrival there with your baggage, . . . whether we run our own cars through or take those of the other road at the point of intersection. You pay through, and you and your baggage shall be carried through.' This is the contract evidenced, we think, by the ticket and the check." What a close analogy between the case under consideration and the Illinois case above cited! And the reason for the rule is well stated. You pay your money to go through, and the company receiving it guarantees to you that you shall go through safely; it is an implied special contract, and it is not limited by any statements written or printed on the check or ticket not signed by the passenger. In support of this doctrine see Quimby *v.* Vanderbilt, 17 N. Y. 306; also Kessler *v.* N. Y. C. R. Co., 7 Lans. 62; Code of Ga., § 2068.

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[*On another point judgment reversed.*]

FRANK *v.* INGALLS.

41 Ohio St. 560. 1885.

Nash, J. The plaintiff in error seeks to have the judgment of the District Court reversed on the theory that a railroad passenger ticket, like those described in the statement of facts, is negotiable and passes by delivery from the holder to a purchaser, and that any person purchasing and receiving such ticket from any holder thereof takes it freed of all equities of the railroad company, or defects of title, or want of authority in the seller to dispose of it.

The character of a railroad-passenger ticket has been considered

by the Supreme Court of this State. In the case of C. C. & C. R. R. Co. *v.* Bartram, 11 Ohio St. 457, it is spoken of as "a convenient symbol to represent the fact that the bearer has paid to the company the agreed price for his conveyance upon the road to the place therein designated." Again, in the case of Railroad Company *v.* Campbell, 36 Ohio St. 647, it is said that a railroad ticket "is simply a voucher that the person in whose possession it is, has paid his fare." Lawson, in his work on "Contracts of Carriers," sec. 106, p. 116, says, "that a railroad or steamboat ticket is nothing more than a mere voucher that the party to whom it is given, and in whose possession it is, has paid his fare and is entitled to be carried a certain distance," and supports his definition by the citation of numerous decisions.

It thus seems to be well established that a railroad ticket is a receipt or voucher. It has more the character of personal property than that of a negotiable instrument. When the possession of such a ticket has been obtained by fraud the company has parted with the possession of it, but not with the title to it, and the person purchasing from the holder, although for value and without notice of equities, takes no better title than the party had who fraudulently obtained possession of it. We do not perceive that the holder of such a ticket is in any better position than the *bona fide* purchaser of goods from one in possession, for a valuable consideration, and without notice of any defect in his vendor's title. Such a purchaser cannot be protected against the title of the true owner in a case where the vendor has fraudulently obtained his possession and without the knowledge or consent of the owner, although previous to such possession he had, by false and fraudulent representations, induced the owner to enter into a contract for the sale of the goods. Dean *v.* Yates, 22 Ohio St. 388; Hamet *v.* Letcher, 37 Ohio St. 356.

From the facts found by the courts below it appears that the possession of the tickets in controversy were obtained from Ingalls, receiver of the railroad company, by the fraud of Fordyce, and we conclude that Frank, the purchaser from Fordyce, obtained no title thereto.

Eagan, the agent of the receiver, authorized to sell such tickets, and stamp and deliver the same upon receiving pay therefor, did not bind his principal when he stamped and delivered the tickets, without his knowledge or consent, to a third person, to be sold by him, and to be paid for when sold.

Judgment affirmed.

SLEEPER *v.* PENNSYLVANIA RAILROAD CO.

100 Penn. St. 259. 1882.

Case, by George W. Sleeper against the Pennsylvania Railroad Co., to recover damages for an illegal ejecting of plaintiff from defendant's train.

On the trial the plaintiff testified that on the morning of May 8th, 1878, he took passage on the defendant's train from New York to Philadelphia and tendered to the conductor in payment of his fare a ticket which he had bought several months before at a place on Broadway, New York, not a regular agency of the company, but a place where they advertised tickets at reduced rates. He further testified that he paid for the ticket one dollar less than the current rates. The conductor refused to receive the ticket, and upon plaintiff's refusing to pay the fare put him off the train at Elizabeth. The present suit was then brought. The court on motion of defendant awarded a nonsuit, which the court *in banc* subsequently declined to take off. Plaintiffs thereupon took this writ, assigning for error the granting of the nonsuit and the refusal to take off the same.

Mr. Justice Trunkey. The parties agree that this case presents a single question, whether a person purchasing a ticket over the Pennsylvania Railroad from New York to Philadelphia, from a ticket-dealer who is not an authorized agent of the company, can maintain an action in the courts of this State for the refusal of the company to carry him between these points in return for said ticket.

By the Act of May 6th, 1863, P. L. 582, it is made the duty of every railroad company to provide each agent authorized to sell tickets entitling the holder to travel upon its road, with a certificate attested by the corporate seal and the signature of the officer whose name is signed to the tickets. And any person not possessed of such authority, who shall sell, barter, or transfer, for any consideration, the whole or any part of a ticket, or other evidence of the holder's title to travel on any railroad, shall be deemed guilty of a misdemeanor, and shall be liable to be punished by fine and imprisonment. The purchasing and using a ticket from a person who has no authority to sell, is not made an offence.

That the plaintiff's ticket, on its face, entitled him to the rights of a passenger between the points named, is unquestioned. The only reason for denying him such right was that he bought from one who sold in violation of the statute in Pennsylvania. It is not said that the vendor in New York is actually guilty of the statutory offence, but that the defendant, being a corporation in Pennsylvania, and the stipulated right of passage being partly in Pennsylvania,

her courts will not enforce a contract resting upon acts which the legislature has declared criminal.

The presumption is that the ticket was properly issued by the company, and that the holder had the right to use it. Such tickets are evidence of the holder's title to travel on the railroad. Prior to the statute in Pennsylvania, it was lawful for holders to sell them.

The property in them passed by delivery. The Act of 1863 confers no right upon a railroad company to question passengers as to when, or where, or how they procured their tickets, or to eject them from the cars upon suspicion that the tickets were sold to them by a person who was not an agent for the company. At common law, which is deemed in force in absence of evidence to the contrary, the contract made by the plaintiff in New York was valid. It was executed. No part remained to be performed. It vested in him the evidence of title to a passage over the railroad. His act had no savor of illegality or immorality. It was the mere purchase of the obligation of a common carrier, to carry the holder according to its terms. The defendant issued the obligation, received the consideration, and became liable for performance at the date of issue. As transferee, the plaintiff claimed performance. This is the contract which is the basis of the cause of action. It is purposely made so as to entitle the *bona fide* holder to performance, and for breach to an action in his own name. Let it be assumed that the defendant made the contract in Pennsylvania, it is quite as reasonable to assume that tickets for passengers coming from New York into Pennsylvania were sold in New York. But wherever the contract was made, it is true, as claimed by the defendant, "this action is to enforce not the contract between the ticket-scalper and the plaintiff in error, but between the defendant in error and the plaintiff in error."

The sale of the ticket to the plaintiff in New York was lawful. That being an executed contract, there is no question respecting its enforcement. Surely it is not an exception to the rule that contracts, valid by the law of the place where they are made, are generally valid everywhere. Then, as the plaintiff has a valid title to the ticket, the contract between the defendant and himself is valid.

Judgment reversed and procedendo awarded.

8. REGULATIONS.

JEFFERSONVILLE R. CO. *v.* ROGERS.

28 Ind. 1. 1867.

FRAZER, J. This was a suit by the appellee against the appellant for unlawfully expelling the appellee from its cars. The complaint alleged that the defendant's ticket agent refused to sell a ticket to the plaintiff; that he thereupon seated himself in the car without such ticket, for the purpose of being carried from Indianapolis to Columbus, and tendered the usual ticket fare to the conductor, who refused that sum and demanded a greater sum by fifteen cents; and upon a refusal by the plaintiff to pay the sum demanded, he was, by the defendant, expelled from the vehicle three miles from a station.

The answer was in two paragraphs. The first was a general denial, under which the matter pleaded in the second was admissible in evidence, and there was therefore no available error in sustaining a demurrer to the latter.

Various questions are made upon the instructions to the jury, and as to the admissibility of evidence, all of which are in the record by an unsuccessful motion for a new trial, there having been a verdict for the plaintiff in the sum of $345.

The evidence established the averments of the complaint upon every point, save that the plaintiff had applied for and been refused a ticket. Upon that subject there was a conflict. It appeared, too, that the appellant discriminated in its charges for passage in favor of persons holding tickets; the usual rate, if paid on the train, being $2.10, and the usual rate for a ticket $1.95. That the ticket agent was at that time supplied with tickets, and instructed to sell them, was clearly proven. Tickets were sold to other persons at that time, and for Columbus. If, therefore, he refused a ticket to the appellee, it was of his own motion and in violation of his duties as agent of the appellant. The appellant existed under a special charter (local laws of 1846, p. 153), which gave it full power to fix its rates of passenger fares, "provided that the rates established from time to time shall be posted up at some conspicuous place or places on said road;" and this had been done as to the rates then usual, both for tickets and when payment was made on board to the conductor.

It is not controverted that the appellant had the right, for its own protection against the possible dishonesty of conductors, and for the convenient transaction of its business, to discriminate in favor of persons purchasing tickets. The regulation is a reasonable one, if

carried out by the corporation in good faith. It tends to protect the corporation from the frauds of its conductors, and from the inconvenience of collecting fares upon its trains in motion; and it imposes no hardship whatever upon travellers. But if the corporation may refuse to furnish the tickets, and thus fail to do what is plainly implied by the adoption and publication of the rule, it would be unreasonable, and therefore not binding upon its passengers. Such a corporation cannot be sustained, in so far as it assumes to be the arbitrary master of its patrons. It is a common carrier of passengers, and must perform the obligations which the law imposes upon it as such. It has no lawful authority to impose upon travellers by vexatious and deceptive rules and regulations, such as the one under consideration would obviously be, if it does not carry with it an obligation on the part of the corporation to afford passengers the opportunity to avail themselves of the discrimination in fares which it publicly offers. That such an obligation does arise out of the adoption of such a regulation was expressly ruled in Illinois. Chicago, &c. Co. *v.* Parks, 18 Ill. 460, and St. Louis, &c. Co. *v.* Dalby, 19 Ill. 353. The latter case is precisely in point here, it being held that the passenger, having been unable to procure a ticket through the fault or neglect of the railroad company's ticket agent, had a right to be carried at the ticket rate, and that upon tender of that sum to the conductor, his subsequent expulsion from the train was a wrong for which the corporation was liable.

In New York, the subject has been regulated to some extent by statute. To ask or receive a greater rate of fare than that allowed by law, entitles the passenger to recover the sum of fifty dollars as a penalty. The New York Central Railroad Company is required to keep its ticket office at Utica open for the sale of tickets for an hour prior to the departure of each train, but it is not required to keep such office open between 11 o'clock P. M. and 5 o'clock A. M.; and if a person at any station where a ticket office is open enters the cars as a passenger, without a ticket, the company may charge five cents in addition to the usual fare, which is fixed at two cents per mile. In Nellis *v.* New York Central Railroad Company, 30 N. Y. 505, where a passenger from Utica entered the train without a ticket, at 1 o'clock A. M., when the ticket office was not open, and was compelled to pay the additional five cents, it was held that the penalty was incurred. It was argued there that the case was not within the statute, because the ticket office was not required to be open at that hour; and upon that point it is said, in the opinion of the court: "It is insisted that because the plaintiff did not do what it was impossible for him to do, to wit, buy a ticket before leaving Utica, he became liable to pay the extra fare. It seems to me the proposition has but to be stated to be rejected as utterly unsound. To compel a passenger to pay a penalty because the company had deprived him of the power to travel for the regular

fare, would be so oppressive and unjust that it would require a positive provision of a legislative act to induce any tribunal to sanction it." Though that case arose under the statutes of New York, and might have been decided without touching upon the subject discussed in the passage quoted, yet the reasoning of the quotation is so forcible and so directly applicable to the point under consideration here that it may well be deemed an authority. And the fact that a State like New York, largely interested in commerce, and whose known policy it is, in every proper way, to foster her great corporations engaged in the transportation of passengers, should, by statute, make their right to discriminate in fares depend upon their affording the passenger an opportunity to avail himself of the discrimination, is worth some consideration when the inquiry is whether such a discrimination can be upheld as reasonable without the corresponding obligation upon the carrier.

Opposed to the doctrine already announced, Crocker *v.* New London, &c. Co., 24 Conn. 249, stands alone, so far as we know. The facts of that case were much like the one at bar, except that the ticket office was closed for the night, to be opened as usual thereafter. That fact was held as proof that the company had withdrawn its proposition to carry at ticket rates, and was therefore not bound to carry a passenger tendering to the conductor merely the price of a ticket. The law certainly deduces no such conclusion from the fact of closing a ticket office, as was reached in that case, to wit: that the offer to carry at ticket rates was withdrawn. It is a conclusion of fact and not of law, and we think not at all a legitimate one. The Supreme Court of Iowa, in citing this case to another point, in the State *v.* Chovin, 7 Iowa, 204, very properly disclaimed any purpose to be understood as concurring with the case upon the question now under examination. But the Connecticut case can have no application whatever to the inquiry as it arises in the present case, for here the evidence is clear that the offer was not withdrawn; that the agent was supplied with tickets and instructed to sell them, and did actually sell them on that occasion to other passengers for Columbus.

The court refused the following instruction, asked by the appellant: —

"If you believe, from the evidence, that the plaintiff did not apply for, and was not refused a ticket, as alleged in his complaint, and that he refused to pay to the conductor of said train the regular and usual fare fixed by said company for a passage paid upon the cars, then the said conductor would have a right to eject the plaintiff from said cars, using no more force than was necessary for that purpose, even though between stations."

The question thus presented is, whether the expulsion, if otherwise rightful, might lawfully occur elsewhere than at a station. This question, in the case before us, does not depend upon a statute.

Our general railroad law, 1 G. & H. 516, does not apply to the appellant, and its charter is silent upon the subject. It is said in the briefs, which have evidently been prepared with great care, that the question is without direct authority. The passenger who refuses to pay fare is from that moment an intruder, and wrongfully on the train. He has no lawful right to be carried *gratis* to the next station. This is too plain to admit of debate. It follows that he may be expelled at once. There may be public considerations, such as the danger of collisions resulting from stopping trains between stations, or the peril to the travelling public consequent upon the increase of speed necessary to regain time thus lost, which justify the enactment of a law that the expulsion must occur at a station. These considerations, however, form no basis for a claim by a passenger to be carried gratuitously from one station to the next. The refusal to give this instruction must reverse the judgment.

. . . . . .

The judgment is reversed, with costs, and the cause remanded for a new trial.

EVERETT *v.* CHICAGO, ETC. R. CO.

69 Iowa, 15. 1886.

On the morning of August 18, 1881, the plaintiff took passage on defendant's railroad at a small station named Weston, intending to travel to Council Bluffs, a distance of ten miles. He did not procure a passenger ticket, and the conductor of the train demanded ten cents in addition to the ticket rate, which the plaintiff refused to pay. Thereupon the conductor caused the train to be stopped, and he forcibly ejected the plaintiff therefrom. This action was brought to recover damages for the alleged wrongful act of the conductor in removing the plaintiff from the train. A trial by jury resulted in a verdict and judgment for the defendant. Plaintiff appeals.

ROTHROCK, J. I. It is provided by section 2 of chapter 68 of the Laws of 1874, Miller's Code, 347, that "a charge of ten cents may be added to the fare of any passenger where the same is paid upon the cars, if a ticket might have been procured within a reasonable time before the departure of the train." The ground upon which the plaintiff based his refusal to pay the ten cents demanded by the conductor was that he was prevented from procuring a ticket, because the ticket office was closed when he presented himself for the purpose of purchasing a ticket. The facts are that the plaintiff is the owner of a large farm some five miles from Weston. His residence is at Council Bluffs, and he made frequent visits to his farm, going

by rail by the way of Weston. He knew that the defendant was authorized to collect ten cents, in addition to the ticket rate, from passengers who neglected to purchase tickets at the station. Weston is a small and unimportant station at which an inconsiderable amount of business is done by the railroad company, either in freight or passenger traffic. As is usual at such places, the company keeps no assistant for the agent; and, when a train arrives, the agent leaves the ticket office, and goes upon the platform of the station to transact his business with the train; such as seeing to the loading of the mail on the train, the receipt and delivery of baggage and express packages, and the like. The plaintiff came in from his farm in the morning, and stopped at a store in the village until he heard the whistle of the train as it approached the station, when he went to the station, and arrived there just before the train came to a full stop. The ticket agent had the office open for a considerable time before the train arrived, and sold tickets to passengers, and he did not leave the office until the engine to which the train was attached had passed the office window, when he went on the platform to attend to his train duties. The train stops at that station only long enough to do the train business and allow passengers to get on and off the cars.

The court permitted all these facts to be shown to the jury, and charged the jury to the effect that if, under all these facts and circumstances, a reasonable time was given to passengers to purchase tickets before the departure of the train, the conductor was authorized to demand the extra ten cents of the plaintiff. One of the instructions to the jury was as follows: "(6) The fact, if it is a fact, that the plaintiff applied at the defendant's ticket office at Weston to purchase a ticket at a time when it was closed, does not of itself alone necessarily show that opportunity was not given within a reasonable time before the departure of the train for the purchase of tickets; nor can it be said, as matter of law, that the defendant had a right to close its ticket office as soon as the train arrived at the station. The question, what is a reasonable time for the procuring of tickets before the departure of trains from a station, depends principally on the requirements, convenience, and demands of the public at that particular station. It was the duty of defendant to keep its ticket office open, and to keep a competent man there to sell tickets at such times as would reasonably, fairly, and fully accommodate the public in the matter of procuring tickets. Regard should be had to the importance of the station, and the number of people who have occasion to purchase tickets there; and the ticket office should be kept open at such times as people in general who travel by rail are in the habit of repairing, and find it convenient to repair, to the station to purchase tickets and get aboard the train."

Counsel for appellant insist that this and other instructions given by the court to the jury are erroneous. They claim that, under a

proper construction of the statute above cited, it was the duty of the railroad company to keep its ticket office open up to the time of the departure of the train: in other words, they claim that by the very terms of the statute the office must be kept open for the sale of tickets just so long as it is possible for passengers to purchase tickets and board the train. Assuming this to be the meaning and intent of the statute, they contend that it was error for the court to submit to the jury the question whether, under the facts, the office was kept open a reasonable time in which passengers might procure tickets. We do not think this position is sound. In our opinion, it was proper to allow the defendant to introduce evidence of the character of the station, and whether the facilities extended to the travelling public to purchase tickets were such as were required for the convenience of the public. It would be a most unreasonable requirement to impose upon the defendant the burden of employing two persons to attend to the station in order that the ticket office might be kept open for the one or two minutes which a train is required to stop at such a station, in order to accommodate the exceptional cases of passengers who may for any reason arrive at the station after the arrival of the train. Regard must be had to the orderly transaction of the business of the station, taking into consideration the necessary and proper facilities extended to persons having occasion to travel on the trains or transact other business with the company. It is absolutely necessary that the office should be open for business a sufficient time before the departure of the train, in order to enable passengers to procure their tickets, receive and count their change, if any, and prepare to board the train, without unnecessary interference with each other. But the language "before the departure of the train" does not require that the office shall remain open up to the instant the train moves off. The question is, might the passenger have procured a ticket within a reasonable time *before* the departure, and *not* up to the very moment when the wheels began to move.

II. Some complaint is made as to the place where the plaintiff was ejected from the cars. It appears that it was half a mile from a public crossing. It is not required in this State that, where a person may rightfully be ejected from a railroad train, it must be done at a station or public crossing. Brown *v.* Railroad Co., 51 Iowa, 235. In the case at bar, all of the facts attending the removal of the plaintiff from the train, and the place where he was removed, were fairly submitted to the jury on what we regard as proper instructions; and the jury, in answer to a special interrogatory, found that the conductor did not act with malice, express or implied, towards plaintiff in ejecting him from the train. We think this finding was fully supported by the evidence.

III. The plaintiff offered to introduce evidence to the effect that the defendant's station was an unfit place for passengers to remain

in waiting for trains because of the close proximity of a privy. The evidence was excluded, and plaintiff's counsel complain of this ruling of the court. We think it was correct. The plaintiff did not allege this as a reason why he did not go to the station and procure a ticket, and he made no such claim to the conductor. His sole ground of recovery was based upon the alleged fact that he could not procure a ticket because the office was closed.

We think the judgment of the district court should be

Affirmed.

TOWNSEND *v.* N. Y. CENTRAL & H. R. R. CO.

56 N. Y. 295. 1874.

Grover, J. This action was brought by the plaintiff to recover damages for an assault upon and forcibly ejecting him from its cars, at Staatsburg, a station on defendant's road between Poughkeepsie and Rhinebeck.

The jury by their verdict have found that the plaintiff purchased a ticket at the station of Sing Sing for Rhinebeck; that with this ticket he went on board a train from New York, going no farther north than Poughkeepsie; that after this train passed Peekskill the conductor called for tickets and the plaintiff handed his to him, which he took and retained, giving to the plaintiff no check or other evidence showing any right to a passage upon any train of the defendant; nor did the plaintiff ask for a return of his ticket or for any such evidence. Upon the arrival of the train at Poughkeepsie, where it stopped, the plaintiff got out and waited at the station until another train arrived from New York, which was going to Albany, stopping at Rhinebeck. The plaintiff got into and seated himself in a car in this train; and after it started the conductor called upon him for his ticket; in reply to which the plaintiff told him that he had purchased a ticket from Sing Sing to Rhinebeck, which the conductor of the other train had taken and had not given back to him; some of the passengers told the conductor that the plaintiff had had such a ticket. The conductor told the plaintiff that it was his duty in case he had no ticket to collect the fare, and that the other conductor would make it right with him. The plaintiff refused to pay fare, and the conductor told him he must leave the train. This the plaintiff refused to do, insisting upon his right to a passage to Rhinebeck upon the ticket which the conductor of the other train had taken. Upon the arrival of the train at Staatsburg, a regular station, the plaintiff, still refusing to pay fare or to leave the train upon request, was taken hold of and such force used

as was necessary to overcome his resistance, and ejected from the car. This was the injury for which the recovery was had.

The court, among other things, charged the jury that the conductor seemed to have done no more than his duty to the company as between him and the company; but at the same time that did not excuse the company for the wrongful act of the other conductor — for which act they were responsible. The defendant's counsel requested the court to charge the jury that this was not a case for punitive or exemplary damages. The court declined so to charge, and in reply said: "I am inclined to think it is a case where the jury are not restricted to actual injuries, — in other words, to compensatory damages." To this the counsel for the defendant excepted. This exception was well taken. It must be kept in mind that the injury for which a recovery was sought was the forcible ejection of the plaintiff from the car by the conductor of the train, not the wrongful taking from the plaintiff of his ticket by the conductor of the other train. The latter was regarded as material, only as making the former act wrongful as against the plaintiff. The court, in substance, charged that in putting the plaintiff off the car the conductor acted in what he believed was the performance of his duty to the company. This being so, it is clear that no punitory damages could have been recovered against him had he been sued instead of the company. In Hamilton *v.* The Third Avenue Railroad Co., 53 N. Y. 25, it was held by this court that a master was not liable for punitory damages for the act of his servant, done under circumstances which would give no such right to the plaintiff as against the servant had the suit been against him instead of the master. Caldwell *v.* The New Jersey Steamboat Co., 47 N. Y. 282, is not at all in conflict with this; nor does it hold that a master is liable to punitory damages for the wrongful act of his servant if free from any wrong of his own. It does hold that a corporation is liable for punitory damages for its own torts and breaches of duty. This error in the charges requires a reversal in the judgment and a new trial.

But there is another important question in the case which will necessarily arise upon a retrial, and which was raised by an exception taken upon the trial already had: that is whether the plaintiff had a right to go upon another train and use force to retain a seat there; refusing to pay fare, having no evidence of any right to a passage, by reason of the conductor of the other train having wrongfully taken and retained his ticket.

It is insisted by the counsel for the plaintiff that this question was decided in favor of the plaintiff in Hamilton *v.* Third Avenue Railroad Company, *supra*. This question was not involved or decided in that case. There the plaintiff testified that when the car upon which he had paid his fare to the City Hall stopped at an intermediate station, the conductor told the passengers to change

cars; that before going on board the car from which he was ejected, he inquired of its conductor whether any transfer ticket was necessary; that the conductor told him it was not; that if he came from the other car he could go on board the one from which he was ejected. This was equivalent to an assurance by that conductor that he could ride upon the car under his control, without further payment of fare or evidence of a right so to do. It was in reference to this testimony that it was said that the company would be liable for his wrongful ejection from the car by the conductor who had given this assurance. But testimony was given by the defendant in direct conflict with this. The judge erroneously charged the jury that, assuming the truth of the latter testimony, and that the conductor acted in good faith in putting the plaintiff off the car, still he was entitled to recover of the company punitory damages if he had paid fare to the City Hall upon the other car. For this error the judgment was reversed and a new trial ordered by this court.

In Hibbard *v.* The New York & Erie Railroad Co., 15 N. Y. 455, it was held by this court that a railroad company had the right to establish reasonable regulations for the government of passengers upon its trains, and forcibly eject therefrom those who refused to comply with such regulations. Surely a regulation requiring passengers either to present evidence to the conductor of a right to a seat, when reasonably required so to do, or to pay fare, is reasonable; and for non-compliance therewith such passenger may be excluded from the car. The question in this case is whether a wrongful taking of a ticket from a passenger by the conductor of one train exonerates him from compliance with the regulation in another train, on which he wishes to proceed upon his journey. I am unable to see how the wrongful act of the previous conductor can at all justify the passenger in violating the lawful regulations upon another train. For the wrongful act in taking his ticket he has a complete remedy against the company. The conductor of the train upon which he was, was not bound to take his word that he had had a ticket showing his right to a passage to Rhinebeck, which had been taken up by the conductor of the other train. His statement to that effect was wholly immaterial, and it was the duty of the conductor to the company to enforce the regulation, as was rightly held by the trial judge, by putting the plaintiff off in case he persistently refused to pay fare. The question is, whether under the facts found by the jury, resistance in the performance of this duty was lawful on the part of the plaintiff. If so, the singular case is presented, where the regulation of the company was lawful, where the conductor owed a duty to the company to execute it, and at the same time the plaintiff had the right to repel force by force and use all that was necessary to retain his seat in the car. Thus, a desperate struggle might ensue, attended by very serious consequences, when both sides were entirely in the right, so far as either

could ascertain. All this is claimed to result from the wrongful act of the conductor of another train, in taking a ticket from the plaintiff, for which wrong the plaintiff had a perfect remedy, without inviting the commission of an assault and battery by persisting in retaining a seat upon another train in violation of the lawful regulations by which those in charge were bound to govern themselves. It was conceded by the counsel, upon the argument, that one buying a ticket, say from Albany for Buffalo, which was wrongfully taken from him by a servant of the company, and who had once been put off for a refusal to pay fare, would not have the right to go upon other trains going to Buffalo, and, if forcibly ejected therefrom, maintain actions against the company for the injuries so inflicted. The reason why he could not, given by the counsel, was, that being once ejected was notice that he could not have a seat upon the ticket which he claimed had been taken from him. But when the conductor in charge of the train explicitly tells him that he cannot retain his seat upon that ticket, that he must pay fare or leave the car, does it not amount to the same thing? He then knows that he cannot proceed upon the ticket taken, but must resort to his remedy the same as though he had been ejected. If, after this notice, he waits for the application of force to remove him, he does so in his own wrong; he invites the use of the force necessary to remove him; and if no more is applied than is necessary to effect the object, he can neither recover against the conductor or company therefor. This is the rule deducible from the analogies of the law. No one has a right to resort to force to compel the performance of a contract made with him by another. He must avail himself of the remedies the law provides in such case. This rule will prevent breaches of the peace instead of producing them; it will leave the company responsible for the wrong done by its servant without aggravating it by a liability to pay thousands of dollars for injuries received by an assault and battery, caused by the faithful efforts of its servants to enforce its lawful regulations.

The judgment appealed from must be reversed and a new trial ordered, costs to abide event.

All concur: Folger and Andrews, JJ., concurring on the first ground; Church, C. J., concurring on last ground stated in opinion.

FREDERICK *v.* M., H. & O. R. CO.

37 Mich. 342. 1877.

Marston, J. This is an action on the case brought to recover damages for being unlawfully ejected and put off a train of cars by the conductor of the train. The evidence on the part of the plain-

tiff tended to show that on the evening of January 29th, 1876, he went to the regular ticket office of the defendant at Ishpeming and asked for a ticket to Marquette, presenting to the agent in charge of the office one dollar from which to make payment therefor; that the agent received the money, handed plaintiff a ticket and some change, retaining sixty-five cents for the ticket, the regular fare to Marquette; that plaintiff did not attempt to read what was on the ticket, nor did he count the change received back until next morning, or notice it until then; that he went on board the train bound for Marquette, and after the train left the station the conductor took up the ticket, giving him no check to indicate his destination, but at the time telling him his ticket was only for Morgan; that when the train reached Morgan the conductor told the plaintiff he must get off there or pay more fare; that if he wanted to go to Marquette he must pay thirty-five cents more; plaintiff insisted he had paid his fare and purchased his ticket to Marquette, and refused to pay the additional fare, whereupon he was ejected from the train, etc. On the part of the defendant evidence was given tending to show that the ticket purchased and presented to the conductor was in fact a ticket for Morgan and not for Marquette. Under the pleadings and charge of the court other evidence in the case and questions sought to be raised need not be referred to, and as the real gist of the action was for the expulsion from the cars by the conductor, the above statement is deemed sufficient to a proper understanding of the case.

An erroneous impression seems to prevail with many that where the conductor of a passenger train ejects therefrom a passenger who has paid his fare to a point beyond, but has lost or mislaid his ticket, or whose ticket does not entitle him to proceed further, or upon that train, that the company is liable in an action at law for all damages which the party may in any way have sustained in consequence of the delay, mortification, injury to his health, or otherwise, and that the passenger is under no obligation to prevent or lessen the damages by payment of the necessary additional fare to entitle him to complete his journey without interruption. Although such damages were claimed in this case, under our present view it will be unnecessary to discuss this question any farther at present.

What then is the duty of the conductor in a case like the present? and what are the passenger's rights? In considering these questions, we cannot shut our eyes to the manner and method which railroad companies and common carriers generally have adopted in order to successfully carry on their business. The view to be taken of these questions must be a practical one, even although it may work perhaps injustice in some special and particular cases, resulting, however, in great part if not wholly from other causes. In Day *v.* Owen, 5 Mich. 521, Mr. Justice Manning in speaking of the rules and regulations of common carriers, said "all rules and regulations

must be reasonable, and, to be so, they should have for their object the accommodation of the passengers. Under this head we include everything calculated to render the transportation most comfortable and least annoying to passengers generally; not to one, or two, or any given number carried at a particular time, but to a large majority of the passengers ordinarily carried. Such rules and regulations should also be of a permanent nature, and not be made for a particular occasion or emergency."

It is within the common knowledge or experience of all travellers that the uniform and perhaps the universal practice is for railroad companies to issue tickets to passengers with the places designated thereon from whence and to which the passenger is to be carried; that these tickets are presented to the conductor or person in charge of the train and that he accepts unhesitatingly of such tickets as evidence of the contract entered into between the passenger and his principal. It is equally well known that the conductor has but seldom if ever any other means of ascertaining, within time to be of any avail, the terms of the contract, unless he relies upon the statement of the passenger, contradicted as it would be by the ticket produced, and that even in a very large majority of cases, owing to the amount of business done, the agent in charge of the office, and who sold the ticket, could give but very little if any information upon the subject. That this system of issuing tickets, in a very large majority of cases, works well, causing but very little if any annoyance to passengers generally, must be admitted. There of course will be cases where a passenger who has lost his ticket, or where through mistake the wrong ticket had been delivered to him, will be obliged to pay his fare a second time in order to pursue his journey without delay, and if unable to do this, as will sometimes be the case, very great delay and injury may result therefrom. Such delay and injury would not be the natural result of the loss of a ticket or breach of the contract, but would be, at least in part, in consequence of the pecuniary circumstances of the party. Such cases are exceptional, and however unfortunate the party may be who is so situate, yet we must remember that no human rule has ever yet been devised that would not at times injuriously affect those it was designed to accommodate. This method of purchasing tickets is also of decided advantage to the public in other respects; it enables them to purchase tickets at times and places deemed suitable, and to avoid thereby the crowds and delays they would otherwise be subject to. Were no tickets issued and each passenger compelled to pay his fare upon the cars, inconvenience and delay would result therefrom, or the officers in charge of the train to collect fares would be increased in numbers to an unreasonable extent, while at fairs and places of public amusement where tickets are issued and sold entitling the purchaser to admission and a seat, we can see and appreciate the confusion which would exist if no tickets were sold, or if

the party presenting the ticket were not upon such occasions to be bound by its terms.

How, then, is the conductor to ascertain the contract entered into between the passenger and the railroad company where a ticket is purchased and presented to him? Practically there are but two ways, — one, the evidence afforded by the ticket; the other the statement of the passenger contradicted by the ticket. Which should govern? In judicial investigations we appreciate the necessity of an obligation of some kind and the benefit of a cross-examination. At common law, parties interested were not competent witnesses, and even under our statute the witness is not permitted, in certain cases, to testify as to the facts, which, if true, were equally within the knowledge of the opposite party, and he cannot be procured. Yet here would be an investigation as to the terms of a contract, where no such safeguards could be thrown around it, and where the conductor, at his peril, would have to accept of the mere statement of the interested party. I seriously doubt the practical workings of such a method, except for the purpose of encouraging and developing fraud and falsehood, and I doubt if any system could be devised that would so much tend to the disturbance and annoyance of the travelling public generally. There is but one rule which can safely be tolerated with any decent regard to the rights of railroad companies and passengers generally. As between the conductor and passenger, and the right of the latter to travel, the ticket produced must be conclusive evidence, and he must produce it when called upon, as the evidence of his right to the seat he claims. Where a passenger has purchased a ticket and the conductor does not carry him according to its terms, or, if the company, through the mistake of its agent, has given him the wrong ticket, so that he has been compelled to relinquish his seat, or pay his fare a second time in order to retain it, he would have a remedy against the company for a breach of the contract, but he would have to adopt a declaration differing essentially from the one resorted to in this case.

We have not thus far referred to any authorities to sustain the views herein taken. If any are needed, the following, we think, will be found amply sufficient, and we do not consider it necessary to analyze or review them. Townsend *v.* N. Y. C. & H. R. R. R. Co., 56 N. Y. 298; Hibbard *v.* N. Y. & E. R. R., 15 N. Y. 470; Bennett *v.* N. Y. C. & H. R. R., 5 Hun, 600; Downs *v.* N. Y. & N. H. R. R., 36 Conn. 287; C., B. & Q. R. R. *v.* Griffin, 68 Ill. 499; Pullman P. C. Co. *v.* Reed, 75 Ill. 125; Shelton *v.* Lake Shore, etc. Ry. Co., 29 Ohio St.

I am of opinion that the judgment should be affirmed with costs.

Cooley, C. J., concurred.

Graves, J. By mistake the company's ticket agent issued and plaintiff accepted a ticket covering a shorter distance than that bargained and paid for; and having ridden under it the distance which

it authorized, and refusing to repay for the space beyond, the plaintiff was removed from the cars.

This removal may, or may not, have constituted a cause of action, but it is not the cause of action charged. The declaration sets up that plaintiff's ticket was a proper one for the whole distance and that he was removed in violation of the right which the ticket made known to the conductor.

There was no proof of the case alleged, and I agree therefore in affirming the judgment.

Campbell, J. The plaintiff's cause of action in this case was for the failure of the company to carry him to a destination to which he had paid the passage-money, and the immediate occasion for his removal from the cars was that he was given a wrong ticket, and was not furnished with such a one as the conductor was instructed to recognize as entitling him to the complete carriage. His declaration should have been framed on this theory. Had it been so framed, I am not prepared to say that he may not have had a right of action for more than the difference in the passage-money.

But as he counted on the failure of the conductor to respect a correct ticket, and it appears the conductor gave him all the rights which the ticket produced called for, there was no cause of action made out under the declaration, and the rule of damages need not be considered. I concur in affirming the judgment.

BRADSHAW *v.* SOUTH BOSTON RAILROAD COMPANY.

135 Mass. 407. 1883.

Tort for being expelled from one of the defendant's cars. Trial in the Superior Court without a jury, before Colburn, J., who reported the case for the determination of this court, in substance as follows: —

The defendant is a common carrier of passengers for hire, owning lines of street cars between South Boston and Boston proper, and, among others, one running over Federal Street Bridge, between Boston and City Point in South Boston by what is called the Bay View route, and another running over Dover Street Bridge between Boston and said City Point by way of Broadway. None of the Dover Street cars run over the Bay View route, and none of the Bay View cars run over Dover Street. When a passenger on the Bay View line wishes to enter the city by way of Dover Street, it is the practice of the defendant, after he has paid his fare, and arrived at the proper place for changing cars, to give him a check, which states that it is good, only on the day of its date, for one

continuous ride, for Bay View passengers, from Dorchester Avenue to the Providence Depot. When a passenger on the Dover Street line wishes to go to some place in South Boston on the Bay View line, it is the practice, after he has paid his fare and arrived at the proper place for changing cars, for the defendant to give him a check, which states that it is good, only on the day of its date, for one continuous ride from Dorchester Avenue to City Point *via* Bay View. The upper left quarter and the lower right quarter of the first-mentioned checks are colored red, and the corresponding quarters of the other checks are colored yellow. The plaintiff was familiar with the practice above mentioned, and had received and used such checks, but had never read them, though able to read, and had never noticed the difference in the color of the checks.

In the afternoon of May 15, 1881, the plaintiff entered one of the Bay View cars of the defendant at the corner of Eighth Street and Dorchester Street in South Boston, intending to go to the corner of Dover Street and Washington Street in Boston, and thence over the Metropolitan Horse Railroad to some point on that line. He paid his fare on the defendant road, and also sufficient to pay for a transfer check to the Metropolitan road, which he received in due form. He told the conductor that he wished for a check to take him over the Dover Street line, which the conductor promised to give him when they arrived at the proper place for changing cars. At the corner of Dorchester Avenue and Broadway he left said car, and, as he left, the conductor handed him the last-named check, by mistake, in place of the first-named. After waiting a short time, a Dover Street car came along, which he entered, and rode as far as the bridge, when the conductor of the car came for his fare, and he tendered him said check. The conductor refused to accept it, (though the plaintiff informed him of the circumstances under which he received it, as above stated), and required him to pay a fare or leave the car. The plaintiff refused to pay a fare, and was forced by said conductor to leave the car. No unnecessary force was used.

Upon these facts, the judge ruled that the plaintiff was not entitled to maintain his action, and found for the defendant.

W. Howland, for the plaintiff.

J. C. Davis, for the defendant, cited Townsend *v.* New York Central & Hudson River Railroad, 56 N. Y. 295 [**691**]; Weaver *v.* Rome, Watertown & Ogdensburg Railroad, 3 Th. & C. 270; Petrie *v.* Pennsylvania Railroad, 13 Vroom, 449; Frederick *v.* Marquette, Houghton & Ontonagon Railroad, 37 Mich. 342 [**694**]; Chicago, Burlington & Quincy Railroad *v.* Griffin, 68 Ill. 499; Shelton *v.* Lake Shore & Michigan Southern Railway, 29 Ohio St. 214; Yorton *v.* Milwaukee, Lake Shore & Western Railway, 54 Wis. 234.

C. Allen, J. It may be assumed, as the view most favorable to the plaintiff, that the defendant was bound by an implied contract

to give him a check showing that he was entitled to travel in the second car, and that it failed to do so; in consequence of which he was forced to leave the second car. It does not appear that the defendant had any rule requiring conductors to eject passengers under such circumstances. We may, however, take notice of the fact that it is usual for passengers to provide themselves with tickets or checks, showing their right to transportation, or else to pay their fare in money. It was the practice for passengers on the defendant's road to receive and use such checks; and the plaintiff intended to conform to this practice.

The conductor of a street-railway car cannot reasonably be required to take the mere word of a passenger that he is entitled to be carried by reason of having paid a fare to the conductor of another car; or even to receive and decide upon the verbal statements of others as to the fact. The conductor has other duties to perform, and it would often be impossible for him to ascertain and decide upon the right of the passenger, except in the usual, simple, and direct way. The checks used upon the defendant's road were transferable, and a proper check, when given, might be lost or stolen, or delivered to some other person. It is no great hardship upon the passenger to put upon him the duty of seeing to it, in the first instance, that he receives and presents to the conductor the proper ticket or check; or, if he fails to do this, to leave him to his remedy against the company for a breach of its contract. Otherwise, the conductor must investigate and determine the question, as best he can, while the car is on its passage. The circumstances would not be favorable for a correct decision in a doubtful case. A wrong decision in favor of the passenger would usually leave the company without remedy for the fare. The passenger disappears at the end of the trip; and, even if it should be ascertained by subsequent inquiry that he had obtained his passage fraudulently, the legal remedy against him would be futile. A railroad company is not expected to give credit for the payment of a single fare. A wrong decision, against the passenger, on the other hand, would subject the company to liability in an action at law, and perhaps with substantial damages. The practical result would be, either that the railroad company would find itself obliged in common prudence to carry every passenger who should claim a right to ride in its cars, and thus to submit to frequent frauds, or else, in order to avoid this wrong, to make such stringent rules as greatly to incommode the public, and deprive them of the facilities of transfer from one line to another, which they now enjoy.

It is a reasonable practice to require a passenger to pay his fare, or to show a ticket, check, or pass; and, in view of the difficulties above alluded to, it would be unreasonable to hold that a passenger, without such evidence of his right to be carried, might forcibly retain his seat in a car, upon his mere statement that he is entitled

to a passage. If the company has agreed to furnish him with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract; but he is bound to yield, for the time being, to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way. It is easy to perceive that, in a moment of irritation or excitement, it may be unpleasant to a passenger who has once paid to submit to an additional exaction. But, unless the law holds him to do this, there arises at once a conflict of rights. His right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules, and to conform to reasonable and settled customs and practices, in order to prevent the company from being defrauded; and a forcible collision might ensue. The two supposed rights are in fact inconsistent with each other. If the passenger has an absolute right to be carried, the conductor can have no right to require the production of a ticket or the payment of fare. It is more reasonable to hold that, for the time being, the passenger must bear the burden which results from his failure to have a proper ticket. It follows that the plaintiff was where he had no right to be, after his refusal to pay a fare, and that he might properly be ejected from the car. This decision is in accordance with the principle of the decisions in several other States, as shown by the cases cited for the defendant; and no case has been brought to our attention holding the contrary.

Judgment for the defendant.

MURDOCK *v.* BOSTON, ETC. R. CO.

137 Mass. 293. 1884.

TORT for being expelled from a train on the defendant's railroad at Pittsfield, and for false imprisonment in the lockup of that town. [The facts are sufficiently stated in the opinion.]

The jury returned a verdict for the plaintiff in the sum of $4500; and the defendant alleged exceptions.

C. ALLEN, J. It appears that the defendant's agent and ticket-seller told the plaintiff that the two tickets would be good for a passage from Springfield to North Adams, and explained the meaning of the punched holes, and, with a full understanding of exactly what the tickets were and of what the plaintiff wanted, sold them to him as tickets good for his contemplated trip. There was nothing on their face to show the contrary to the plaintiff, and he took and paid for them on the strength of these explanations and assurances of the ticket-seller. There was no mistake on the part of either as to where the plaintiff wished to go, or what terms were

actually expressed upon the tickets, or what marks or punched holes they bore. The circumstances of there being two tickets, and of the holes in one of them, naturally induced inquiry by the plaintiff, and he had no reason to distrust the correctness of the explanations which were given to him. The ticket-seller assumed to know, and gave assurances which the plaintiff had a right to rely on, and which he did rely on. If, when the conductor refused to accept the punched ticket, it had appeared on an inspection of it that there had been a mistake, and that it did not on its face purport to be good for a passage over that part of the defendant's road, and that the ticket-seller had delivered to the plaintiff a good ticket upon some other railroad, or to some place which had already been passed, when the mistake was discovered, and it was found that the plaintiff had through inadvertence accepted a ticket which on its face was plainly insufficient, then this case would have fallen within the doctrine of the recent decision in Bradshaw *v.* South Boston Railroad, 135 Mass. 407, and it would have been the duty of the plaintiff to yield for the time being, and pay his fare anew, or withdraw from the car, unless a distinction should be taken between the rights of passengers upon steam railways and street railways, under such circumstances, — a question which we do not now consider. See Cheney *v.* Boston & Maine Railroad, 11 Met. 121; Yerton *v.* Milwaukee, Lake Shore & Western Railway, 54 Wis. 234; Townsend *v.* New York Central & Hudson River Railroad, 56 N. Y. 295 [691]; Petrie *v.* Pennsylvania Railroad, 13 Vroom, 449; Dietrich *v.* Pennsylvania Railroad, 71 Penn. St. 432; Frederick *v.* Marquette, Houghton & Ontonagon Railroad, 37 Mich. 342 [694]; McClure *v.* Philadelphia, Wilmington & Baltimore Railroad, 34 Md. 532.

But, in the present case, such is not the position of the parties. As has been seen, the plaintiff not only was not guilty of any negligence in accepting his ticket, but he examined it carefully, saw everything there was on it, and received explanations of the meaning of the punched holes, and assurances that the two tickets, in the condition in which they were, would be good for the trip. In such a case, there being no mistake or inadvertence on his part in the respects mentioned, and the tickets which were delivered being in all particulars such as were intended to be delivered, and there being nothing which could be gathered by inspection to show that they were insufficient, and no notice of their insufficiency being given to the plaintiff by anybody, or in any form, until he had already entered upon and partially accomplished his journey over the defendant's road, he might well insist upon being allowed to complete that journey. If the defendant's superintendent or president, or both of them, had been standing by when the plaintiff purchased his tickets, and had heard and assented to what was said by the ticket-seller, and if they also were under the same mistake as to

the rules established for the guidance of conductors, the legal position of the plaintiff would hardly have been stronger than it is at present. It would still be the case that he took his tickets relying on the mistaken assurances of the defendant's agent in respect to their validity. If the defendant, through any imperfection in its rules or methods, or any ignorance or violation of rules or instructions by its agents, has been led into any interference with the rights of the plaintiff under such circumstances, it must abide the consequences. To hold the contrary would be a burden upon passengers such as is called for by no reason of necessity or expediency.

On the other hand, it is no more than a wholesome requirement that railway companies should be responsible in damages for the consequences of a mishap such as occurred in the present case. The conductor's explanation of the meaning of the two punched holes might or might not be correct; at any rate, their meaning was purely arbitrary, and, so far as the plaintiff could see, the conductor's interpretation was no more probable or intelligible than that given by the ticket-seller. The plaintiff had a right to act upon the explanations given to him at the time when he bought his ticket. The mistake was that of the ticket-seller, in supposing that the punched holes signified that the ticket had been used only to Chester, whereas in fact, according to the defendant's rules for the instruction and guidance of conductors, they signified that it had been used to Pittsfield, a station farther on. The offer of the conductor to give a receipt to the plaintiff for the additional fare which he demanded, stating the circumstances under which it was paid, so that the plaintiff might get back the money, if it should be found that his account of the purchase of the ticket was true, though showing good faith on the part of the conductor, did not have the effect to make it the legal duty of the plaintiff to pay the additional fare.

It follows that all the instructions requested were properly refused, except as modified by the presiding judge; and the instructions which were given were clearly and accurately expressed. Maroney *v.* Old Colony & Newport Railway, 106 Mass. 153.

Exceptions overruled.

PHILADELPHIA, W. & B. R. CO. *v.* RICE.

64 Md. 63. 1885.

Robinson, J. The appellee, plaintiff below, bought a round-trip ticket from Wilmington to Philadelphia. The ticket was in two coupons, attached to each other, one being for the trip to Philadel-

phia, and the other for the return trip. Shortly after leaving Wilmington the conductor came through for tickets, took the plaintiff's ticket, tore off the coupon for the trip to Philadelphia, and, by mistake, punched the return coupon. A few minutes after he came back and said to plaintiff: "Let me see that ticket. I think I have made a mistake." He then took the ticket which was the return coupon punched by him, and wrote on the back of it with a pencil the words, "Cancelled by mistake," and returned it to the plaintiff saying: "I have fixed it all right. Now you can ride on it." The next day, the plaintiff, on the return trip to Wilmington, handed to the conductor of that train the punched coupon, which, however, he declined to accept, because it had been cancelled. The plaintiff then called his attention to the writing on the back of the ticket, and explained how it had been punched and the mistake corrected by the conductor on the trip to Philadelphia. But the conductor declined to accept the explanation, saying to the plaintiff: "Anybody could have written that. You could have done it yourself." The mistake, it seems, had not been corrected according to the rules of the company, which required the conductor making the mistake to draw a ring around the cancellation mark, and write on the back of the ticket the word "Error" and sign his name or initials. The conductor accordingly demanded of the plaintiff the fare from Philadelphia to Wilmington, and, upon his refusal to pay it, he was put off the train. Upon these facts it is admitted an action will lie against the company for a breach of contract as a carrier, or for the negligence of the conductor in cancelling the plaintiff's ticket, and thereby destroying the only evidence of his right to the return trip; but, inasmuch as the cancellation had not been corrected according to the rules of the company, the ejection of the plaintiff, under such circumstances, it is argued, does not in itself furnish a substantive ground of action. We shall not stop to examine the several cases relied on in support of this contention. Hufford *v.* Railroad Co., 18 Reporter, 147; Frederick *v.* Railroad Co., 37 Mich. 342 [**694**]; Yorton *v.* Railway Co., 57 Wis. 234; 11 N. W. Rep. 482; Bradshaw *v.* Railroad Co., 135 Mass. 407 [**698**]. It is sufficient to say the facts in this case differ materially from the facts in those cases. Here the plaintiff was wholly without fault. He had purchased a ticket which entitled him to a round trip from Wilmington to Philadelphia. The return coupon was cancelled through the mistake of the conductor. This error he attempted to correct and informed the plaintiff that it was all right. The latter had a right to rely on this assurance, and that the ticket for which he had paid his money entitled him to return to Wilmington. If the servants of the appellant, under such circumstances, laid their hands forcibly on the person of the plaintiff, and compelled him to leave the car, there was not merely a breach of contract on the part of the company, but an unlawful interference with the person of the plaintiff, and an

indignity to his feelings for which an action will lie, and for which he is entitled to be compensated in damages. Such is the well-settled law of this State and of this country. The mistake by which the plaintiff's ticket was cancelled was the mistake of the appellant's servant, and it must abide the consequences. There was no error therefore in the rulings of the court in this respect.

But, in addition to damages for the unlawful interference with the person of the plaintiff, and the indignity to his character and feelings, the court also instructed the jury that, if he was maliciously or wantonly ejected from the train, he was entitled to recover exemplary damages as a punishment to the appellant. Now, we have not been able to find a particle of evidence from which the jury could find that the plaintiff was wantonly or maliciously ejected from the car. The ticket which he handed to the conductor Mattison was a cancelled ticket, one which upon its face showed it had been used. It had been cancelled, it is true, by the mistake of another conductor, but this mistake had not been corrected according to the rules of the company. Mattison could not therefore recognize it as a ticket entitling the plaintiff to the trip to Wilmington, and, if the latter refused to pay his fare or to leave the car, the conductor was obliged to eject him forcibly. The proof shows the conductor acted in good faith, and in obedience to the rules of the company, and that no greater force was used than was actually necessary. No complaint is made by the plaintiff in his testimony of unnecessary force, or that any abusive language was used. The brakeman, he says, "put his hand on his shoulder, and pulled him across the person who was sitting by him." At first he had made up his mind to resist, but upon the advice of friends he concluded to go out without further resistance. The testimony of his friends Friedenrich and Hobbs is to the same effect. Hobbs says the manner "of the conductor and brakeman was firm and decided. They looked angry." This is the evidence on the part of the plaintiff to support the claim for punitive damages, damages as a punishment to the appellant for having acted in bad faith, or maliciously, or wantonly, or in a spirit of oppression. The case, it seems to us, is wanting in every element necessary to entitle the plaintiff to vindictive damages. Camp, as a passenger who saw and heard all that took place, says: "The conductor told the plaintiff he must have all the tickets regular, and hoped he would not think hard of him. His orders were imperative and he was only doing his duty. The brakeman put his hand gently on plaintiff's shoulder and he went out without resistance. All the parties," witness thought, "acted like gentlemen." This case comes before us a second time, and we naturally feel some reluctance in sending it back for another trial. But as there is no evidence from which the jury could reasonably find that the plaintiff was wantonly or maliciously put off the train, the court erred in granting the plaintiff's third prayer, by which the

question of punitive damages was submitted to the finding of the jury. Judgment reversed, and new trial awarded.

BRYAN, J., dissents.

KANSAS CITY, ETC. R. CO. *v.* RILEY.

68 Miss. 765. 1891.

ACTION for damages against the railroad company for ejecting appellee from a train. On the trial of the case, at the instance of plaintiff, the court gave the following instructions: —

"1. If the jury believe from the evidence that the plaintiff procured a round-trip ticket from Myrtle to Blue Springs and return, and that on her way out to Blue Springs, the conductor, Dustin, took from said round-trip ticket the return part of said ticket and left the plaintiff the out-going part, and plaintiff did not know this, and that plaintiff, in good faith, on her return journey offered conductor Hadaway the portion of the ticket not taken from her, and said last conductor requested her to leave the train or pay fare again at any rate, then this was wrongful on the part of said conductor, and defendant is liable in damages therefor to plaintiff.

"2. The court further charges the jury for the plaintiff, that the law implies some damage for the violation of every legal right, the amount to be determined by the jury according to the evidence.

"3. If the jury believe from the evidence in the case that the conduct of the conductor Hadaway toward Mrs. Riley was characterized by rudeness and violence, or gross carelessness and wilful wrong, they may find for the defendant punitive damages as a punishment to the defendant for such conduct, and they are the judges of the proper amount according to the law and evidence in the case."

These instructions were objected to, and the court was asked to instruct the jury to find for defendant. This being refused, defendant asked an instruction to the effect that plaintiff could only recover the value of the ticket from Blue Springs to Myrtle, for loss of time, and such other actual damages as she sustained. This was refused as well as other instructions asked, announcing, in effect, the converse of the propositions stated in plaintiff's instructions. After verdict and judgment for plaintiff, defendant made a motion for a new trial, which was overruled. The opinion contains a further statement of the case.

COOPER, J. On or about the 3d of September, 1889, the plaintiff, with her husband, purchased from the agent of appellant at Myrtle two tickets for transportation over appellant's road to Blue Springs and return, both places being stations on appellant's road.

These tickets were handed to the conductor on the train running from Myrtle to Blue Springs, and by accident and mistake he returned to the passengers the wrong part of the tickets, giving to them that portion which called for transportation from Myrtle to Blue Springs, which he should have kept, and retaining that portion calling for passage from Blue Springs to Myrtle, which he should have returned to the passengers. The plaintiff went from Blue Springs to Sherman, another station on appellant's road, and, on the 6th of September, being desirous of returning to Myrtle, she purchased a ticket from Sherman to Blue Springs, and for the journey from that place to Myrtle tendered that portion of the round-trip ticket from Myrtle to Blue Springs that had been returned to her by the conductor on the 3d, but this ticket the conductor refused to accept, because it entitled the bearer to transportation from Myrtle to Blue Springs, and not from Blue Springs to Myrtle.

The plaintiff had not before noticed the mistake that had been made by the other conductor, but then explained to the conductor of the train upon which she was travelling how it had occurred, and insisted upon her right to be carried on the ticket. But this he declined, and informed the plaintiff that she must either pay train fare, buy a ticket at Blue Springs when the train should reach that point, or leave the train there. The plaintiff and the conductor testified to about the same facts as to what transpired until the train reached Blue Springs, at which point, as the conductor stated, the plaintiff and her husband left the train upon his refusal to carry them on the tickets they then had, while the plaintiff testified that the conductor spoke to her in an angry manner, and took her by the arm to put her off the train.

At all events, the plaintiff left the train at Blue Springs with her husband and there remained until the following day, and brings this suit for damages against the appellant. The jury awarded her damages in the sum of $300, and, from a judgment for that sum, the defendant appeals.

The decisions are in direct and palpable conflict upon the liability of a common carrier for failure to transport a passenger under the circumstances named. In New York, Michigan, Illinois, Maryland, Ohio, Wisconsin, Connecticut, New Jersey, Massachusetts, and North Carolina it seems to have been decided that the ticket presented by the passenger is the only evidence of his right to travel upon the train which can be recognized by the conductor, and that if by reason of the negligence of other servants of the carrier, a wrong ticket has been given to the passenger, or the right ticket has been given to him, but erroneously taken from him, the passenger's right of action is for the wrong thus committed, and that he may not insist upon his right to travel on the wrong ticket or without it, when it has been taken up, and recover damages for the refusal of the carrier to permit him to do so, and that the carrier may law-

fully eject him from its train, using no more force than is necessary for that purpose.

The authorities in support of this rule are found in the brief of counsel for appellant. On the other hand, it is held in Georgia and Indiana, that the passenger is entitled to travel according to his real contract with the carrier, where the mistake in giving the proper ticket or in taking up a proper one held by the passenger is caused by the negligence of the servants of the carrier. R. R. Co. *v.* Fixe, 11 Am. & Eng. Ry. Cas. 108.

In a more recent case in Michigan than those cited by appellant's counsel, Hufford *v.* Railroad Co., 64 Mich. 634, the plaintiff had applied and paid for a ticket from Manton to Traverse City. The agent gave him a ticket previously issued for a ride from Sturgis to Traverse City. There was evidence tending to show that the ticket had been cancelled by conductor's marks for a ride between Sturgis and Walton, and the trial court instructed the jury that "if they believed the ticket was punched, indicating to the conductor by the punch-mark that it had been used before between Grand Rapids and Walton, that would be evidence of an infirmity in the ticket, and the plaintiff would not be entitled to insist upon that ticket being received." This instruction was held to be erroneous, the court saying: "When the plaintiff told the conductor on the train that he had paid his fare, and stated the amount he had paid to the agent who gave him the ticket he presented, and told him it was good, it was the duty of the conductor to accept the statement of the plaintiff until he found out it was not true, no matter what the ticket contained in words, figures, or other marks."

The most remarkable thing about this decision is, that it was made in the same case upon the same facts and between the same parties as that reported in 53 Mich. 118, in which, in an opinion delivered by Judge Cooley, it was held that, as between the conductor and the passenger, "the ticket must be conclusive evidence of the extent of the passenger's right to travel."

There is a class of cases somewhat analogous to the present one, in which, by a uniform course of decisions so far as we are informed, it is held that the conductor must accept the statements of the passenger. We refer to those cases in which different rates are charged for one who has procured a ticket and one who pays upon the train. It is held that, as a condition precedent to the exercise of this right to charge higher train-rates, and to expel one refusing to pay them, a reasonable opportunity must be given by the carrier to the passenger to procure the ticket required, and that one to whom no such opportunity has been afforded, and who for refusing to pay the higher rate is expelled from the train, may recover damages therefor. Hutchinson on Carriers, § 571, and authorities in note 2; Forsee *v.* Railroad Co., 69 Miss. 66.

Without determining more upon this disputed question than is

necessary for the decision of the case before us, it is sufficient to say that where, as here, the ticket in the hands of the passenger supports and confirms the truth of his statement, and no possible injury can result to the carrier by the conductor's accepting and acting thereon, he must so act, or refuse, at the peril of inviting an action for damages against his principal if the statement be true.

We do not decide that a person holding a ticket from Myrtle to Blue Springs has a right to ride from Blue Springs to Myrtle, but no real injury could result to the carrier in recognizing such right, for the distance is the same, and in the usual course of business as many trains pass in one direction as the other. What we do decide is, that a passenger holding and attempting to use such ticket under the circumstances disclosed in this record, and explaining to the conductor how the mistake occurred by which the ticket read in the wrong direction, makes such a reasonable and probable showing as entitles him to be dealt with as a passenger, and therefore that any regulation of the carrier authorizing the conductor of its trains to disregard such statement is unreasonable, and need not be submitted to by the passenger.

We find no error in the record for which the judgment should be reversed, and it is

Affirmed.

SWAN *v.* MANCHESTER, ETC. R.

132 Mass. 116. 1882.

TORT in two counts. The first count was for expelling the plaintiff from the defendant's cars at Windham, in the State of New Hampshire. The second count was for refusing to sell the plaintiff a ticket entitling him to be carried over the defendant's railroad from said Windham to Lawrence, in this Commonwealth. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court on appeal, upon agreed facts, the material parts of which appear in the opinion.

DEVENS, J. The regulation that all passengers, who shall purchase tickets before entering the cars of a railroad company to be transported therein, shall be entitled to a small discount from the advertised rates of fare, but, if such ticket is not purchased, the full rate of fare shall be charged, is a reasonable one, and in no way violates the rule, which in New Hampshire has the sanction of the statute law, that the rates shall be the same for all persons between the same points. Commonwealth *v.* Power, 7 Met. 596; Johnson *v.* Concord Railroad, 46 N. H. 213; St. Louis, Alton & Terre Haute Railroad *v.* South, 43 Ill. 176; Illinois Central Railroad *v.* Johnson, 67 Ill. 312; Indianapolis, Peru & Chicago Railroad *v.*

Rhoad, 46 Ind. 293; Du Laurans *v.* St. Paul & Pacific Railroad, 15 Minn. 49.

The number of persons carried, the rapidity with which the cars move, the frequency and shortness of their stops, the delay and inconvenience of making change, the various details to be attended to by the conductor while the train is in motion or at the stations, and the importance to the railroad company of conducting its business at fixed places, render the mode of payment by tickets previously purchased one of advantage to the railroad company and of convenience to the public. A passenger who is without a ticket and declines to pay full fare may ordinarily be ejected from a train at a station, as one may who absolutely refuses to pay his fare. State *v.* Goold, 53 Maine, 279; Stephen *v.* Smith, 29 Vt. 160; Hilliard *v.* Goold, 34 N. H. 230, and cases above cited.

These positions are not controverted by the plaintiff, who maintains that, although he had no ticket, he was entitled to be carried for the price of one, in view of his failure to procure one under the circumstances hereafter stated. The table of prices advertised by the defendant authorized the ticket-seller to make a discount of fifteen cents, had the plaintiff purchased one for the journey he proposed to make from Derry to Lawrence, the advertised fare being sixty-five cents. Until the time advertised for the departure of the train from Derry had expired, the ticket-seller had been in his office. He left it after that time, and while the train was approaching, in order to aid the station agent, as he was accustomed to do, in loading the baggage upon the passenger trains. While the plaintiff did not approach the ticket-office to find it vacant and the ticket-seller absent until after the time had expired for the departure of the train as advertised, there was sufficient time for him to have procured his ticket before the train actually started from the station, if the ticket-seller had then been in the office. He entered the train without a ticket, and the conductor, acting according to the rules of the company, demanded the full price for the fare, sixty-five cents, which the plaintiff refused to pay, insisting upon his right to be carried for fifty cents, the price of a ticket, which he tendered, but which the conductor refused, telling the plaintiff he must leave the train at the next station, unless the demand for full fare was complied with. On the arrival of the train at the next station, the plaintiff, failing to comply with the demand of the conductor, was ordered by him to leave the train, which he did.

Upon this part of his case, the plaintiff contends that, inasmuch as he went to the office to procure a ticket, and was unable so to do, as above stated, he was entitled to be carried for the price of a ticket, which he tendered, and that his exclusion from the train was therefore unjustifiable.

It has been held in a few cases that the offer to carry passengers at a less rate if tickets were procured, was in the nature of a pro-

posal, like other proposals to enter into a contract, dependent for its acceptance upon the compliance with its condition; that it might be withdrawn at any time; that closing the office for the sale of tickets was such withdrawal; and that the offer carried with it no obligation on the part of the company to open an office, or to keep such office open for any length of time, it being merely an offer to make the deduction if the ticket should be procured. Crocker *v.* New London, Willimantic & Palmer Railroad, 24 Conn. 249; Bordeaux *v.* Erie Railway, 8 Hun, 579.

In a much larger number of cases, and with much better reason, it has been held that where the railroad undertakes to conduct its business by means of tickets, whether it requires, as it may, the possession of a ticket as a prerequisite to entering its cars, or whether it offers a deduction from the regular or advertised rate to one who shall procure a ticket in advance, it is a part of its duty to afford a reasonable opportunity to obtain its tickets. St. Louis, Alton & Terre Haute Railroad *v.* South, *ubi supra;* Chicago & Alton Railroad *v.* Flagg, 43 Ill. 364; Jeffersonville Railroad *v.* Rogers, 28 Ind. 1; Indianapolis, Peru & Chicago Railroad *v.* Rinard, *ubi supra;* Du Laurans *v.* St. Paul & Pacific Railroad, *ubi supra.*

Adopting on this part of the case the rule most favorable to the plaintiff, he was afforded a fair and reasonable opportunity to obtain a ticket. Delays must necessarily from time to time arise in the progress of a train from a variety of incidental circumstances, but at the stations everything may be definitely arranged with reference to the time when by the schedule the train is to depart. A traveller should be at the station sufficiently early to make the ordinary preparation for his journey according to this, and has a right to expect that other matters in which he is interested will be accommodated to the schedule arranged; that suitable persons will then be at the station to take charge of his baggage and to provide him with a ticket. The plaintiff had a reasonable opportunity to procure a ticket, if for a time sufficient to attend to the business, and up to the time when the train was advertised to depart, the ticket-office was open and there was a proper person in attendance. The delay of the train did not enlarge his rights, nor could it entitle him to insist that at the station whence he was to start the office of the ticket-seller should not be closed until its arrival. Trains may be delayed for hours, especially during the storms of winter, from causes which cannot be controlled. The ticket-sellers, especially at the numerous small stations, must have imposed upon them various other duties; and it would not be a reasonable rule that should compel them to be at their posts sometimes for hours after the time when everything at the station should have been arranged for the departure. St. Louis, Alton & Terre Haute Railroad *v.* South, *ubi supra.*

The cases of Porter *v.* New York Central Railroad, 34 Barb. 353, Nellis *v.* New York Central Railroad, 30 N. Y. 505, and Chase *v.* New York Central Railroad, 26 N. Y. 523, all depend upon a statute of New York applicable to the New York Central Railroad Company alone, which requires it, at every station on its road where there is a ticket-office, to keep the same open "at least one hour prior to the departure of each passenger train from such station." This has been held to mean its actual departure, and that road is necessarily governed by this positive provision of law.

The plaintiff, having no right to insist on being carried for the price of a ticket, and declining to pay the regular fare, was properly expelled from the train on its arrival at Windham, one of the stations on the road.

While the train stopped at Windham, and after the plaintiff's expulsion therefrom, he applied to the ticket-seller for a ticket from Windham to Lawrence, tendered him the money therefor, which the ticket-seller accepted, but, upon being informed of the fact by the conductor that the plaintiff had taken passage at Derry, and requested not to sell him a ticket, declined so to do, and tendered to the plaintiff his money, which the plaintiff declined to receive, at the same time stating "that he wished to go on that train." Under the direction of the conductor, the train started, leaving the plaintiff at the station, and he proceeded thence to Lawrence by carriage, a distance of twelve miles, there not being another train until five hours later.

If his original expulsion from the train were lawful, the plaintiff contends, on these facts, that the railroad company has no justification for refusing thereafter to transport him to Lawrence. The plaintiff did not seek to purchase a ticket from Windham, or offer the money therefor, except to prosecute his journey to Lawrence by the same train, which he had entered at Derry, and from which he had been rightfully expelled. Because tickets are sold from Windham to Lawrence, he contends that he desired to make a new contract at the regular price from that point, which the defendant, as a common carrier of passengers, had no right to refuse. Whatever might be his rights, if he had sought to purchase a ticket for or go by a subsequent train from Windham, he sought to continue a transaction which had begun by his entering the cars at Derry to go to Lawrence, when he had thus impliedly contracted to pay the regular fare for that journey, which included the distance from Windham. He was not in the situation of a passenger whose journey was to commence at Windham; he had already been brought from Derry, and the claim that he should have been carried by the same train from Windham, on paying from that point, was a claim that he might renew the same contract he had already broken, by paying for the distance over which the journey was yet to be prosecuted, while he made no payment for the distance over which he had

already been transported. While the journey which he had begun and for which he had contracted to pay continued, he could not at his pleasure break it into two separate transactions. That which he sought to make had been included in his original contract, and the defendant was not obliged to re-admit him to the same train, from which his expulsion had been proper, so long at least as he persisted in his violation of the contract he had originally made.

In O'Brien *v.* Boston & Worcester Railroad, 15 Gray, 20, it was held that a person, who had been properly ejected for non-payment of fare at a place where there was no station, could not, by again entering the cars and tendering the fare, obtain the right to be carried by them.

If this case is distinguishable, as the plaintiff suggests, by the fact that the expulsion there was not at a station, and the re-entry into the cars was at a place where the company was not bound to receive passengers, it is also distinguishable, and in this matter not in favor of the plaintiff, by the fact that the person there expelled offered to pay the entire fare for the journey which he had begun.

If the rightful expulsion takes place at a station, it is not an unreasonable rule that the person expelled should pay the fare over the distance already travelled before he can purchase a ticket from such station for the remainder of the journey which will entitle him to be carried on the same train. This point was directly adjudged in Stone *v.* Chicago & Northwestern Railroad, 47 Iowa, 82, and in O'Brien *v.* New York Central & Hudson River Railroad, 80 N. Y. 236.

The case of State *v.* Campbell, 3 Vroom, 309, goes further than we are required to do in the present inquiry. The traveller there had an excursion ticket from New Brunswick to New York, good for a single day, which had passed, and the ticket was thus exhausted. He had also a regular ticket, which then entitled him to a passage between the same points. The latter ticket he kept in his pocket, refused to exhibit any other than the exhausted ticket, and was ejected from the cars, at Newark, a station on the road. He then exhibited the regular ticket, which would have entitled him to the passage if previously shown, and claimed to re-enter the cars. His previous conduct was held to fully justify his exclusion from the same train.

The only other case cited by the plaintiff which requires notice is Nelson *v.* Long Island Railroad, 7 Hun, 140. It was there held that a passenger put off the car for refusing to pay his fare cannot be taken back upon complying with the rule violated, unless he be at a regular station, and then and there obtain a ticket, or tender his fare. An examination of the case will show that the obtaining of a ticket, or tendering the fare referred to, is a ticket or fare for the whole distance travelled and to be travelled, and not for the remainder of the proposed journey. *Judgment affirmed.*

ILLINOIS CENTRAL R. CO. *v.* WHITTEMORE.

43 Ill. 420. 1867.

Lawrence, J. This was an action of trespass brought by Whittemore against the Illinois Central Railroad Company and N. W. Cole, a conductor in the service of the company, for wrongfully expelling the plaintiff from a train. It appears the plaintiff had taken passage from Decatur to El Paso, and had procured the necessary ticket. After the train passed Kappa, the station preceding El Paso, the conductor demanded the plaintiff's ticket, which the latter refused to surrender without a check. This the conductor refused to give; and after some controversy with the plaintiff, stopped the train, and with the aid of a brakeman expelled the plaintiff. There is considerable evidence in the record given for the purpose of showing that, even admitting the right of the defendants to expel the plaintiff, an unnecessary and wanton degree of violence was used from which the plaintiff received a permanent and severe injury. As, however, the case must be submitted to another jury, we forbear from any comments on this portion of it. The jury gave the plaintiff a verdict for $3,125, for which the court rendered judgment, and the defendants appealed.

In sustaining a demurrer to the fourth plea, and in giving the instructions, the Circuit Court held that, although the rules of the road required the conductor to take up the plaintiff's ticket, and notwithstanding he may have refused to surrender it when demanded, the defendants had no right to expel him from the cars, except at a regular station. In support of this position, it is urged by counsel for appellee that the refusal to surrender the ticket was merely equivalent to a refusal to pay the fare, and that the statutory prohibition against the expulsion of passengers for this cause, except at a regular station, should be applied to cases like the present. We held, in the case of Chicago & Atlantic R. R. *v.* Flagg, 43 Ill. 364, that the neglect to buy a ticket before entering the train, when required by the rules of the road, was the same thing in substance as the refusal to pay the fare, and justified an expulsion only at a regular station. But the refusal to surrender a ticket for which the requisite fare has already been paid is certainly not the same thing as refusal to pay the fare. It may be no worse offence against the rights of the railroad company than the refusal to pay the fare, but it is not the same offence. Perhaps there was no good reason why the legislature should have forbidden railways to expel a passenger only at a regular station for the non-payment of fare, and have left them at liberty to expel one at any other point, for the disregard of any other reasonable rule. But it

has done so, and it is our duty to leave the law as the legislature thought proper to establish it.

What, then, is the right of a railway company in reference to its passengers? Clearly, to require of them the observance of all such reasonable rules as tend to promote the comfort and convenience of the passengers, to preserve good order and propriety of behavior, to secure the safety of the train, and to enable the company to conduct its business as a common carrier with advantage to the public and to itself. So long as such reasonable rules are observed by a passenger, the company is bound to carry him; but if they are wantonly disregarded, that obligation ceases, and the company may at once expel him from the train, using no more force than may be necessary for that purpose, and not selecting a dangerous or inconvenient place. This is a common-law right, arising from the nature of their contract and occupation as common carriers, and, as already remarked, it has been restricted by the legislature only in cases where the offence consists in non-payment of fare. Ch., B. & Q. R. R. Co. *v.* Parks, 18 Ill. 460; Hilliard *v.* Gould, 34 N. H. 230; Cheney *v.* Boston & Maine R. R. Co., 11 Metc. 121. If, then, the regulation requiring passengers to surrender their tickets was a reasonable one, the ruling of the court below on this point was erroneous.

That the rule is a reasonable one really admits of no controversy. It was shown by witnesses on the trial, and must be apparent to any one, that the company must have the right to require the surrender of tickets, in order to guard itself against imposition and fraud, and to preserve the requisite method and accuracy in the management of its passenger department.

The Circuit Court left it to the jury to say whether the rule was reasonable. This was error. It was proper to admit testimony, as was done, but, either with or without this testimony, it was for the court to say whether the regulation was reasonable, and, therefore, obligatory upon the passengers. The necessity of holding this to be a question of law, and, therefore, within the province of the court to settle, is apparent from the consideration, that it is only by so holding, that fixed and permanent regulations can be established. If this question is to be left to juries, one rule would be applied by them to-day and another to-morrow. In one trial a railway would be held liable, and in another, presenting the same question, not liable. Neither the companies nor passengers would know their rights or their obligations. A fixed system for the control of the vast interests connected with railways would be impossible, while such a system is essential equally to the roads and to the public. A similar view has recently been taken of this question in the case of Vedder *v.* Fellows, 20 N. Y. 126.

The judgment must be reversed; but if it appears, upon another trial, that unnecessary violence was used, the defendants must respond in damages.

CHICAGO, etc. R. CO. *v.* WILLIAMS.

55 Ill. 185. 1870.

Appeal from the Circuit Court of Winnebago County; the Hon. Benjamin R. Sheldon, Judge, presiding.

This was an action on the case, brought in the court below by Anna Williams, a colored woman, against the Chicago & Northwestern Railway Company, to recover damages resulting to the plaintiff by reason of being excluded from the privileges of a car upon the defendants' road, which had been designated, under the rules of the company, for the exclusive use of ladies, and gentlemen accompanied by ladies, the only reason for such exclusion of the plaintiff being on account of her color.

Upon the trial, the plaintiff recovered a judgment for $200, from which the company appealed.

Mr. Justice Scott. There is but one question of any considerable importance presented by the record in this case.

It is simply, whether a railroad company, which, by our statute, and the common law, is a common carrier of passengers, in a case where the company, by their rules and regulations, have designated a certain car in their passenger train for the exclusive use of ladies, and gentlemen accompanied by ladies, can exclude from the privileges of such car a colored woman, holding a first-class ticket, for no other reason except her color.

The evidence in the case establishes these facts — that, as was the custom on appellants' road, they had set apart in their passenger trains a car for the exclusive use of ladies, and gentlemen accompanied by ladies, and that such a car, called the "ladies' car," was attached to the train in question. The appellee resided at Rockford, and being desirous of going from that station to Belvidere, on the road of appellants, for that purpose purchased of the agent of the appellants a ticket, which entitled the holder to a seat in a first-class car on their road. On the arrival of the train at the Rockford station, the appellee offered and endeavored to enter the ladies' car, but was refused permission so to do, and was directed to go forward to the car set apart for and occupied mostly by men.

On the appellee persisting on entering the ladies' car, force enough was used by the brakeman to prevent her. At the time she attempted to obtain a seat in that car, on appellants' train, there were vacant and unoccupied seats in it, for one of the female witnesses states that she, with two other ladies, a few moments afterwards, entered the same car at that station, and found two vacant seats, and occupied the same. No objection whatever was made,

nor is it insisted any other existed, to appellee taking a seat in the ladies' car, except her color. The appellee was clad in plain and decent apparel, and it is not suggested, in the evidence or otherwise, that she was not a woman of good character and proper behavior.

It does not appear that the company has ever set apart a car for the exclusive use, or provided any separate seats for the use, of colored persons who might desire to pass over their line of road. The evidence discloses that colored women sometimes rode in the ladies' car, and sometimes in the other car, and there was, in fact, no rule or regulation of the company in regard to colored passengers.

The case turns somewhat on what are reasonable rules, and the power of railroad companies to establish and enforce them.

It is the undoubted right of railroad companies to make all reasonable rules and regulations for the safety and comfort of passengers travelling on their lines of road. It is not only their right, but it is their duty to make such rules and regulations. It is alike the interest of the companies and the public that such rules should be established and enforced, and ample authority is conferred by law on the agents and servants of the companies to enforce all reasonable regulations made for the safety and convenience of passengers.

It was held in the case of Ill. Cent. R. R. Co. *v.* Whittemore, 43 Ill. 423, that, for a non-compliance with a reasonable rule of the company, a party might be expelled from a train at a point other than a regular station.

If a person on a train becomes disorderly, profane, or dangerous and offensive in his conduct, it is the duty of the conductor to expel such guilty party, or at least to assign him to a car where he will not endanger or annoy the other passengers. Whatever rules tend to the comfort, order, and safety of the passengers, the company are fully authorized to make, and are amply empowered to enforce compliance therewith.

But such rules and regulations must always be reasonable, and uniform in respect to persons.

A railroad company cannot capriciously discriminate between passengers on account of their nativity, color, race, social position, or their political or religious beliefs. Whatever discriminations are made, must be on some principle, or for some reason, that the law recognizes as just and equitable, and founded in good public policy. What are reasonable rules is a question of law, and is for the court to determine, under all the circumstances in each particular case.

In the present instance, the rule that set apart a car for the exclusive use of ladies, and gentlemen accompanied by ladies, is a reasonable one, and the power of the company to establish it has never been doubted.

If the appellee is to be denied the privilege of the "ladies' car," for which she was willing to pay, and had paid, full compensation to the company, a privilege which is accorded alike to all women,

whether they are rich or poor, it must be on some principle or under some rule of the company that the law would recognize as reasonable and just. If she was denied that privilege by the mere caprice of the brakeman and conductor, and under no reasonable rule of the company, or, what is still worse, as the evidence would indicate, through mere wantonness on the part of the brakeman, then it was unreasonable, and therefore unlawful. It is not pretended that there was any rule that excluded her, or that the managing officers of the company had ever given any direction to exclude colored persons from that car. If, however, there was such a rule, it could not be justified on the ground of mere prejudice. Such a rule must have for its foundation a better and a sounder reason, and one more in consonance with the enlightened judgment of reasonable men. An unreasonable rule, that affects the convenience and comfort of passengers, is unlawful, simply because it is unreasonable. The State *v.* Overton, 4 Zab. 435.

In the case of the West Chester & Philadelphia R. R. Co. *v.* Miles, 55 Penn. 209, it was admitted, that no one could be excluded from a carriage by a public carrier on account of color, religious belief, political relations or prejudice, but it was held, not to be an unreasonable regulation to seat passengers so as to preserve order and decorum, and prevent contacts and collisions arising from well-known repugnances, and therefore a rule that required a colored woman to occupy a separate seat in a car furnished by the company, equally as comfortable and safe as that furnished for other passengers, was not an unreasonable rule.

Under some circumstances, this might not be an unreasonable rule.

At all events, public carriers, until they do furnish separate seats equal in comfort and safety to those furnished for other travellers, must be held to have no right to discriminate between passengers on account of color, race, or nativity, alone.

We do not understand that the appellee was bound to go forward to the car set apart for and occupied mostly by men, when she was directed by the brakeman. It is a sufficient answer to say, that that car was not provided by any rule of the company for the use of women, and that another one was. This fact was known to the appellee at the time. She may have undertaken the journey alone, in view of that very fact, as women often do.

The above views dispose of all the objections taken to the instructions given by the court on behalf of the appellee, and the refusal of the court to give those asked on the part of the appellants, except the one which tells the jury that they may give damages above the actual damages sustained, for the delay, vexation, and indignity to which the appellee was exposed, if she was wrongfully excluded from the car. If the party in such case is confined to the actual pecuniary damages sustained, it would, most often, be no compensa-

tion at all, above nominal damages, and no salutary effect would be produced on the wrong-doer by such a verdict. But we apprehend, that if the act is wrongfully and wantonly committed, the party may recover, in addition to the actual damages, something for the indignity, vexation, and disgrace to which the party has been subjected.

It is insisted that the damages are excessive, in view of the slight injury sustained.

There is evidence from which the jury could find that the brakeman treated the appellee very rudely, and placed his hand on her and pushed her away from the car. The act was committed in a public place, and whatever disgrace was inflicted on her was in the presence of strangers and friends. The act was, in itself, wrongful, and without the shadow of a reasonable excuse, and the damages are not too high. The jury saw the witnesses, and heard their testimony, and with their finding we are fully satisfied.

Perceiving no error in the record, the judgment is affirmed.

Judgment affirmed.

Mr. Justice SHELDON, having heard this cause in the court below, took no part in this decision.

BREESE, J. I am not prepared to assent to all the reasoning and conclusions of the above opinion, and I am further of opinion the damages are excessive.

APPENDIX.

IMPORTANT FEDERAL STATUTES RELATING TO CARRIERS.

LIMITATION OF LIABILITY.

REVISED STATUTES OF THE UNITED STATES.

SECTION 4281. If any shipper of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds, or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks, or time-pieces of any description, trinkets, orders, notes, or securities for payment of money, stamps, maps, writings, title-deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs, or lace, or any of them, contained in any parcel, or package, or trunk, shall lade the same as freight or baggage, on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered. [28 Feb., 1871, c. 100, § 69.]

SEC. 4282. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner. [3 Mar. 1851, c. 43, § 1.]

SEC. 4283. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. [Ibid. § 3.]

SEC. 4284. Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto. [Ibid. § 4; 27 Feb. 1877, c. 69.]

SEC. 4285. It shall be deemed a sufficient compliance on the part of such owner with the requirements of this Title relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease. [3 Mar. 1851, c. 43, § 4.]

SEC. 4286. The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this Title relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof. [Ibid. § 5.]

SEC. 4287. Nothing in the five preceding sections shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel. [Ibid. § 6.]

SEC. 4288. Any person shipping oil of vitriol, unslaked lime, inflammable matches, or gunpowder, in a vessel taking cargo for divers persons on freight, without delivering, at the time of shipment, a note in writing, expressing the nature and character of such merchandise, to the master, mate, officer, or person in charge of the lading of the vessel, shall be liable to the United States in a penalty of one thousand dollars. But this section shall not apply to any vessel of any description whatsoever used in rivers or inland navigation. [Ibid. § 7.]

SEC. 4289. The provisions of the seven preceding sections, and of section eighteen of an act entitled "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying-trade, and for other purposes," approved June twenty-sixth, eighteen hundred and eighty-four, relating to the limitations of the liability of the owners of vessels, shall apply to all sea-going vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal-boats, barges, and lighters. [Ibid.; 18 Feb. 1875, c. 80; as amended by Act of 19 June, 1886, c. 421, § 4.]

ACT OF JUNE 26, 1884, c. 121.

(23 STAT. AT LARGE, 57.)

SEC. 18. That the individual liability of a ship-owner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: *Provided*, That this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said ship-owners.

BILLS OF LADING.

ACT OF FEB. 13, 1893, c. 105.

(27 STAT. AT LARGE, 445.)

Be it enacted, etc., That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

SEC. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

SEC. 4. That it shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.

SEC. 5. That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libelled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.

SEC. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners, or representatives.

SEC. 7. Sections one and four of this act shall not apply to the transportation of live animals.

SEC. 8. This act shall take effect from and after the first day of July, eighteen hundred and ninety-three.

Approved, February 13, 1893.

INTERSTATE COMMERCE.

ACTS OF CONGRESS, FEB. 4, 1887, c. 104; MAR. 2, 1889, c. 382; FEB. 10, 1891, c. 128.

(24 STAT. AT LARGE, 379; 25 Id. 855; 26 Id. 743.)

Be it enacted, etc., That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States or the District of Columbia or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transhipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country;

Provided, however, That the provisions of this act shall not apply to the

transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just;

And every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines;

But this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance;

Provided, however, That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for

longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

SEC. 5. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof;

And in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offence.

SEC. 6. That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route.

The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges.

Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places, in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation in such form that they shall be accessible to the public and can be conveniently inspected.

Any common carrier subject to the provisions of this act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment;

And any freight shipped from the United States, through a foreign country into the United States, the through rate on which shall not have been made public as required by this act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production; and any law in conflict with this section is hereby repealed.

No advance shall be made in the rates, fares, and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection.

Reductions in such published rates, fares, or charges shall only be made after three days' previous public notice, to be given in the same manner that notice of an advance in rates must be given.

And when any such common carrier shall have established and pub-

lished its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force.

Every common carrier subject to the provisions of this act shall file with the Commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said Commission of all changes made in the same. Every such common carrier shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party.

And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said Commission. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said Commission, in so far as may, in the judgment of the Commission, be deemed practicable;

And said Commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares, and charges, or to such part of them as it may deem it practicable for such common carrier to publish, and the places in which they shall be published.

No advance shall be made in joint rates, fares, and charges, shown upon joint tariffs, except after ten days' notice to the Commission, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect.

No reduction shall be made in joint rates, fares, and charges, except after three days' notice, to be given to the Commission as is above provided in the case of an advance of joint rates.

The Commission may make public such proposed advances or such reductions, in such manner as may, in its judgment, be deemed practicable, and may prescribe from time to time the measure of publicity which common carriers shall give to advances or reductions in joint tariffs.

It shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare, or charge is named thereon than is specified in the schedule filed with the Commission in force at the time.

The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged, and may change the form from time to time as shall be found expedient.

If any such common carrier shall neglect or refuse to file or publish its schedules or tariffs of rates, fares, and charges as provided in this section, or any part of the same, such common carrier shall, in addition to

those penalties herein prescribed, be subject to a writ of mandamus, to be issued by any circuit court of the United States in the judicial district wherein the principal office of said common carrier is situated, or wherein such offense may be committed, and if such common carrier be a foreign corporation in the judicial circuit wherein such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section; and such writ shall issue in the name of the people of the United States, at the relation of the Commissioners appointed under the provisions of this act; and the failure to comply with its requirements shall be punishable as and for a contempt.

And the said Commissioners, as complainants, may also apply, in any such circuit court of the United States, for a writ of injunction against such common carrier, to restrain such common carrier from receiving or transporting property among the several States and Territories of the United States, or between the United States and adjacent foreign countries, or between ports of transshipment and of entry and the several States and Territories of the United States, as mentioned in the first section of this act, until such common carrier shall have complied with the aforesaid provisions of this section of this act.

As amended by sec. 1 of act of March 2, 1889.

SEC. 7. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.

SEC. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery which attorney's fee shall be taxed and collected as part of the costs in the case.

SEC. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.

In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver,

trustee or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit ; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

SEC. 10. That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall wilfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall wilfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States, within the jurisdiction of which such offence was committed, be subject to a fine of not to exceed five thousand dollars for each offence:

Provided, That if the offence for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges, for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

Any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and wilfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offence was committed, be subject to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offence.

Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and wilfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misde-

manner, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offence was committed, be subject for each offence to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court.

If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation or otherwise, induce any common carrier subject to the provisions of this act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person, or such officer or agent of such corporation or company, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offence was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offence; and such person, corporation, or company shall, also, together with said common carrier, be liable, jointly, or severally, in an action on the case to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.

As amended by sec. 2, act of March 2, 1889.

SEC. 11. That a Commission is hereby created and established to be known as the Interstate Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate.

The Commissioners first appointed under this act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, Anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed.

Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party.

No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment.

No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission.

SEC. 12. That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created.

And the Commission is hereby authorized and required to execute and enforce the provisions of this act;

And, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States;

And for the purposes of this act the Commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing.

And in case of disobedience to a subpœna the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question;

And any failure to obey such order of the court may be punished by such court as a contempt thereof.

The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding. [See later act on p. 738.]

The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation depending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation.

Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation.

Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition.

Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear

and testify and produce documentary evidence before the Commission as hereinbefore provided.

Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission.

All depositions must be promptly filed with the Commission.

Witnesses whose depositions are taken pursuant to this act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

As amended by act of February 10, 1891.

SEC 13. That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts;

Whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of.

If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

SEC. 14. That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found.

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

The Commission may provide for the publication of its reports and deci-

sions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained, in all courts of the United States, and of the several States, without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports.

As amended by sec. 4 of act of March 2, 1889.

SEC. 15. That if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission;

And if, within the time specified, it shall be made to appear to the Commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the Commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.

SEC. 16. That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate, or refuse or neglect to obey or perform any lawful order of requirement of the Commission created by this act, not founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, it shall be lawful for the Commission or for any company or person interested in such order or requirement, to apply in a summary way, by petition, to the circuit court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be;

And the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants, in such manner as the court shall direct;

And said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition;

And on such hearing the findings of fact in the report of said Commission shall be prima facie evidence of the matters therein stated; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said Commission drawn in

question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same;

And in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction, or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of five hundred dollars for every day, after a day to be named in the order, that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining or into court, to abide the ultimate decision of the court, or into the Treasury; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree in personam in such court.

When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon; and such court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable;

Whenever any such petition shall be filed or presented by the Commission it shall be the duty of the district attorney, under the direction of the Attorney-General of the United States, to prosecute the same; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice given by said Commission as provided in the fifteenth section of this act, it shall be lawful for any company or person interested in such order or requirement to apply in a summary way by petition to the circuit court of the United States sitting as a court of law in the judicial district in which the carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and said court shall by its order thereupon fix a time and place for the trial of said cause, which shall not be less than twenty nor more than forty days from the time said order is made, and it shall be the duty of the marshal of the district in which said proceeding is pending to forthwith serve a copy of said petition, and of said order, upon each of the defendants, and it shall be the duty of the defendants to file their

answers to said petition within ten days after the service of the same upon them as aforesaid.

At the trial of the findings of fact of said Commission as set forth in its report shall be prima facie evidence of the matters therein stated, and if either party shall demand a jury or shall omit to waive a jury the court shall, by its order, direct the marshal forthwith to summon a jury to try the cause;

But if all the parties shall waive a jury in writing, then the court shall try the issues in said cause and render its judgment thereon.

If the subject in dispute shall be of the value of two thousand dollars or more either party may appeal to the Supreme Court of the United States under the same regulations now provided by law in respect to security for such appeal; but such appeal must be taken within twenty days from the day of the rendition of the judgment of said circuit court.

If the judgment of the circuit court shall be in favor of the party complaining, he or they shall be entitled to recover a reasonable counsel or attorney's fee, to be fixed by the court, which shall be collected as part of the costs in the case.

For the purposes of this act, excepting its penal provisions, the circuit courts of the United States shall be deemed to be always in session.

As amended by sec. 5 of act of March 2, 1889.

SEC. 17. That the Commission may conduct its proceedings in such manner as will best conduce to the proper despatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney.

Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested.

Said Commission shall have an official seal, which shall be judicially noticed.

Either of the members of the Commission may administer oaths and affirmations and sign subpœnas.

As amended by sec. 6 of act of March 2, 1889.

SEC. 18. That each Commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the judges of the courts of the United States.

The Commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars, payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties.

Until otherwise provided by law, the Commission may hire suitable offices for its use, and shall have authority to procure all necessary office supplies.

Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their orders, in making any investigation, or upon official business in any other places than in the City of Washington, shall be allowed and paid

on the presentation of itemized vouchers therefor approved by the chairman of the Commission.

As amended by sec. 7, act of March 2, 1889.

SEC. 19. That the principal office of the Commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or of the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States.

It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this act.

SEC. 20. That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information.

Such annual reports shall show in detail —

The amount of capital stock issued;

The amounts paid therefor, and the manner of payment for the same;

The dividends paid, the surplus fund, if any, and the number of stockholders;

The funded and floating debts and the interest paid thereon;

The cost and value of the carrier's property, franchises, and equipment;

The number of employees and the salaries paid each class;

The amounts expended for improvements each year, how expended, and the character of such improvements;

The earnings and receipts from each branch of business and from all sources;

The operating and other expenses;

The balances of profit and loss;

And a complete exhibit of the financial operations of the carrier each year,

Including an annual balance-sheet.

Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts with other common carriers, as the Commission may require;

And the said Commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe (if in the opinion of the Commission it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

SEC. 21. That the Commission shall, on or before the first day of December in each year, make a report, which shall be transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress.

This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commis-

sion may deem necessary; and the names and compensation of the persons employed by said Commission.

As amended by sec. 8, act of March 2, 1889.

SEC. 22. That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates

For the United States, State, or municipal governments,

Or for charitable purposes,

Or to or from fairs and expositions for exhibition thereat,

Or the free carriage of destitute and homeless persons transported by charitable societies,

And the necessary agents employed in such transportation,

Or the issuance of mileage, excursion, or commutation passenger tickets;

Nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion,

Or to municipal governments for the transportation of indigent persons,

Or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes.

Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees,

Or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees;

And nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies:

Provided, That no pending litigation shall in any way be affected by this act.

As amended by sec. 9, act of March 2, 1889.

ACT OF MARCH 2, 1889.

(25 STAT. AT LARGE, 855.)

SEC. 10. That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ;

Provided, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact:

Provided, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement.

ACT OF FEB. 11, 1893, c. 83.

(27 STAT. AT LARGE, 443.)

Be it enacted, etc. That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpœna of the Commission, whether such subpœna be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpœna or lawful requirement of the Commission shall be guilty of an offence, and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Approved February 11, 1893.

INTERSTATE COMMERCE IN INTOXICATING LIQUORS.

ACT OF CONGRESS, AUG. 8, 1890, c. 728.

(26 STAT. AT LARGE, 313.)

Be it enacted, etc. That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

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